Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1838

RUTH RAISEN,

Petitioner,

VERSUS

PHILIP RAISEN AND INSURANCE COMPANY OF NORTH AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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INDEX

Opinion 1

Jurisdiction 1

Questions presented 2

Statutory provisions involved 3

Reasons for granting the writ 7

1. The Florida Supreme Court erred in upholding the doctrine of interspousal immunity which classifies people by their marital status in that said classification is arbitrary and does not serve important state objectives or achieve those objectives as required by the Equal Protection Clause of the United States Constitution.

2. The Florida Supreme Court erred in upholding the doctrine of interspousal immunity which denied married couples access to the Court contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

Conclusion 16

Certificate of Service 17

Appendix A-1

CITATIONS

Boddie v. Connecticut,
401 U.S. 371 (1970) 13

Coffindaffer v. Coffindaffer,
244 S.E. 2d 338, (W.Va. 1978) 9

Eisenstadt v. Baird,
405 U.S. 438 (1972) 7, 8, 9, 10, 11, 13

Freehe v. Freehe,
81 Wash. 2d 183, 500 P.2d 777 (Wash 1972) 10

Glona v. American Guarantee Co.,
391 U.S. 73 (1968) 8, 9

Hampton v. Mow Sun Wong,
426 U.S. 88 (1975) 14

Mullane v. Central Hanover Tr. Co.,
339 U.S. 306 (1950) 13

Nashville, C & St. L. Ry v. Browning,
191 U.S. 477 (1940) 8

Orefice v. Albert,
237 So.2d 142 (1970) 9

Pennsylvania R.R. Co. v. Hughes,
191 U.S. 477 (1903) 7, 8

Railway Express Agency v. New York,
336 U.S. 106 (1949) 7

Reed v. Reed,
404 U.S. 71 (1971) 12

CITATIONS (Continued)

Royster Guano Co. v. Virginia,
253 U.S. 412 (1919) 7

Stanton v. Stanton,
421 U.S. 7 (1975) 11

Taylor v. Louisiana,
419 U.S. 522 (1975) 11

Thompson v. Thompson,
218 U.S. 611 (1910) 12

Trammel v. United States,
100 S. Ct. 906 (1980) 10, 11, 14, 15

Yick Wo v. Hopkins,
118 U.S. 356 (1885) 13

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend V 3, 6, 13

U.S. CONST. amend XIV 3, 6, 7, 8, 12, 13

STATUTES

Fla. Stat. 708.08 3
Fla. Stat. 708.09 4

OTHER AUTHORITY

Prosser, Torts §122 (4th ed. 1971) 9, 11
8 Wigmore, §2228 10
47 Tenn. L. Rev 123, (1979) 11

IN THE SUPREME COURT OF THE
UNITED STATES

No.

RUTH RAISEN,

Petitioner

VERSUS

PHILIP RAISEN and INSURANCE COMPANY
of NORTH AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The petitioner, Ruth Raisen, respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the Supreme Court of Florida entered in this proceeding on December 20, 1979 and February 21, 1980.

OPINION BELOW

The opinion and order denying rehearing in the Supreme Court reported at 379. So.2d 352 together with the decision of the Fourth District Court of Appeals reported at 370 So.2d 1148 appear in the appendix to this brief.

JURISDICTION

The judgment of the Supreme Court of Florida was entered

on December 1979. A timely petition for rehearing was denied without opinion in February 21, 1980. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. The Florida Supreme Court erred in upholding the doctrine of interspousal immunity which classifies people by their marital status in that said classification is arbitrary and does not serve important state objectives as required by the Equal Protection Clause of the United States Constitution.

2. The Florida Supreme Court erred in upholding the doctrine of interspousal immunity which denies married couples access to the Court contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT (V.)

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

§ 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

708.08 Married women's rights; separate property; release of dower

(1) Every married woman is empowered to take charge of and manage and control her separate property, to contract

and to be contracted with, to sue and to be sued, to sell, convey, transfer, mortgage, use, and pledge ger real and personal property and to make, execite, and deliver instruments of every character without the joinder or consent of her husband in all respects as fully as if she were unmarried. Every married woman has and may exercise all rights and powers with respect to her separate property, income and earnings and may enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried and without the joinder or consent of her husband. Any claim or judgment against a married woman shall not be a claim or lien against her inchoate right of dower in her husband's separate property. All conveyances, contracts, transfers, or mortgages of real property or any interest in it, executed by a married woman without the joinder of her husband after the effective date of the 1968 Constitution of Florida, are as valid and effective as though the husband has joined.

(2) Any married woman having a right of dower in real property may relinquish it by joining in a conveyance or mortgage of the property or by a separate instrument without the joinder of her husband, executed in the same manner as conveyances.

708.09 Same; agreements with husband, power of attorney, etc.

Every married woman may enter into agreements and contracts with her husband, may become the partner of her husband or others, may give a power of attorney to her husband, and may execute powers conferred upon by her husband, including the power to execute and acknowledge all instruments, including relinquishments of dower, conveying, transferring, or encumbering property, or any interest in it, owned by her, or by herself and her husband as tenants by the entirety, or by her husband. All powers of attorney heretofore executed by a wife to her husband and vice-versa, and the execution of all documents executed thereunder, are hereby validated and confirmed.

STATEMENT OF THE CASE & FACT

On September 4, 1976, the Petitioner, Ruth Raisen, was injured when her husband negligently operated the automobile that she and two mutual friends were traveling in. (R.1-3)

At the time of the accident and the filing of the lawsuit, the Petitioner and the Respondent had been living together as husband and wife for 37 years. The Petitioner alleged in her complaint, that the filing of this suit would not destroy matrimonial harmony maintained between herself and her husband, and that she did not conspire to promote a fraudulent claim with her husband, but that this action was one for substantial injuries wherein the insurance company was the real party in interest. (R.3)

In addition, the Petitioner alleged in her Complaint that any prohibition against her being able to maintain this suit against her husband, the Respondent, Philip Raisen, would violate her rights under the Constitution of the United States of America, which guarantees to all citizens equal protection and due process of the law.(R.3)

The Respondents, Philip Raisen and Insurance Company of North America, filed a Motion to Dismiss and moved the Trial Court to dismiss the complaint on the grounds that it failed to state a cause of action since Florida does not permit tort actions by a wife against her husband, and that the Court lacked jurisdiction over the subject matter on the basis of interspousal immunity.

A hearing was held on April 18, 1977, before the Honorable John G. Ferris, of the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, and subsequent thereto on April 21, 1977, the Final Judgment of Dismissal with prejudice was entered against the Petitioner on the ground that the cause of action was barred by the doctrine of interspousal immunity.

"R" refers to the record on appeal for the Supreme Court of Florida.

On May 18, 1977, the Petitioner filed her Notice of Appeal with the Fourth District Court of Appeal. In her brief she reasserted her rights under the Fifth and Fourteenth Amendments to the United States Constitution. She argued that classifying persons on the basis of their marital status, thereby denying them access to the Court and thus a legal remedy for personal injury, violated the Due Process Clause of the Fifth and the Fourteenth Amendments.

On July 19, 1978, the District Court of Appeal affirmed the judgment of the Trial Court and dismissed the Petitioner's Complaint: However, the District Court determined that the issue of interspousal immunity was of great public interest, and thereupon certified the following question to the Supreme Court of the State of Florida.

> Does the Doctrine of Interspousal Immunity preclude a tort action between husband and wife in all cases or will such an action lie if it is alleged and proven that none of the traditional reasons supporting Interspousal Immunity are applicable.

The Petitioner timely filed her notice of appeal and in support thereof reasserted her rights under the Fifth and Fourteenth Amendments of the United States Constitution in her accompanying brief to the Supreme Court of Florida. On December 20, 1979, the Court, notwithstanding the constitutional rights of the Petitioner, affirmed the decision below stating that the threat of fraudulent suits and the disruption of matrimonial harmony supported the common law doctrine of interspousal immunity.

Thereafter a timely motion for rehearing was filed, and on February 21, 1980, it was denied without opinion by the Florida Supreme Court. Accordingly, the Petitioner seeks a writ of certiorari to this Court seeking to abrogate the doctrine of interspousal immunity, as said doctrine clearly violates the Fifth and Fourteenth Amendments of the United States Constitution.

REASONS FOR GRANTING THE WRIT

The Doctrine of Interspousal Immunity has long outlined its usefullness, and the modern trend of authority has been to abrogate same. In fact, over thirty jurisdictions have recognized the need to change in order to permit one spouse to maintain an action against the other.

The Florida Supreme Court in upholding interspousal immunity implicitly considered and rejected the constitutional ramifications inherent in the doctrine. In so doing, the Court below denied the Petitioner, Ruth Raisen, her rights of Equal Protection and Due Process by arbitrarily denying her access to the Court to protect her person and property as guaranteed by the Constitution. The petitioner now seeks a writ of certiorari, and advances two reasons for granting the writ.

1. The Florida Supreme Court erred in upholding the Doctrine of Interspousal Immunity which classifies people by their marital status in that said classification is arbitrary and does not serve important state objectives or achieve those objectives as required by the Equal Protection Clause of the United States Constitution.

State classifications that distinguish between married and unmarried individuals are subject to scrutiny under the Equal Protection Clause *Eisenstadt v. Baird*, 405 U.S. 438 (1972). Whether the classification is by administrative regulation, *Railway Express Agency v. New York*, 336 U.S. 106 (1949), statute, *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1919), or by judicial decisions following the common law, *Pennsylvania R.R. Co. v. Hughes*, 191 U.S. 477, 89 (1903), it must not be inconsistent with the fundamentals underlying the Equal Protection Clause of the United States Constitution. *U.S. CONST. amend. XIV.*

While it is well settled that a state may administer the common law to promote the welfare of its citizens, in so doing it cannot interfere with rights secured by the Constitution of the United States. *Pennsylvania R.R. Co.*, 191 U.S. at 89. It is unnecessary for a law to be found in a statute book to violate the 14th Amendment for the Equal Protection Clause did not write an "empty formalism" into the Constitution. *Nashville, C & St. L. Ry v. Browning*, 310 U.S. 362, 69 (1940).

To withstand constitutional challenge classifications by marital status must serve important state objectives and must be substantially related to the achievements of those objectives. *Eisenstadt v. Baird*, 405 U.S. at 447.

In retaining the doctrine of interspousal immunity, the State of Florida's two objectives are to protect its Courts from fraudulent suits and to preserve matrimonial harmony by prohibiting adversary tort lawsuits between a husband and his wife. A careful examination reveals that it fails to accomplish both of these goals and is therefore unconstitutional.

A. FRAUDULENT SUITS

Opening the Courts to this type of suit may conceivably tempt some spouses to file fraudulent claims. However, this Court has rejected the possibility of fraudulent law suits as a sufficient state objective to support a statutory classification. *Glona v. American Guarantee Co.*, 391 U.S. 73,76 (1968). In *Glona*, Louisiana law prevented a mother of an illegitimate child from bringing an action for wrongful death. While a woman might be tempted to assert motherhood fraudulently, this Court categorized the problem as one of proof and insufficient to justify a statutory classification. *Glona*, 391 U.S. at 76.

Assuming arguendo that the possibility of fraudulent law-

suits is a valid state purpose, the doctrine of interspousal immunity is not substantially related to the achievement of that objective. Just as the possibility of a woman feigning motherhood in *Glona* is unlikely, so is the possibility of self-inflicted injuries. It is hard to imagine a spouse purposefully falling down stairs or allowing his or her counterpart to stike them with the family car in order to achieve the substantial injury necessary to make jury litigation worthwhile. See *Coffindaffer v. Coffindaffer*, 244 S.E. 2d 338, 43 (W. Va. 1978). Florida permits lawsuits between cousins, brothers and sisters and adult children and parents. In fact, other than interspousal suits, Florida only prohibits suits between minor children and their parents based upon the fictional unity between a parent and their unemancipated child. *Orefice v. Albert*, 237 So. 2d 142 (1970).

The possibility of fraud is just as great in these suits as in interspousal litigation since both involve close family members. Prosser, Torts §122 (4th ed. 1971). In allowing other intrafamily suits, where the possibility of fraud is as great, Florida has clearly abandoned the purpose of interspousal immunity insofar as fraudulent suits are concerned. *Eisenstadt*, 405 U.S. at 449. The application of interspousal immunity in light of Florida's acquiesence in other intrafamily litigation is clearly an arbitrary denial of a spouse's fundamental right of equal protection, in that it fails to treat people similarly situated uniformly.

This argument has equal validity in the preservation of marital or intrafamily harmony which is addressed later in Petitioner's brief. Certainly it would be fallacious to assume that a suit between close family members other than a husband and wife would be any less disruptive to domestic life.

Furthermore, counsel for the insurance company through discovery as well as the intelligence of jurors in assessing the credibility of the evidence should significantly decrease any possibility of fraudulent suits. In reviewing the experience of over one dozen states who at that time abrogated the doctrine

of interspousal immunity, the Washington Supreme Court noted that there was no indication that court dockets have become cluttered with trivial or fraudulent law suits. See *Freehe v. Freehe*, 81 Wash. 2d 183, 500 P. 2d 777 (Wash 1972).

The experience of the jurisdictions which have abrogated the doctrine clearly indicate that allowing interspousal tort litigation does not increase the number of fraudulent suits. As such, the common law doctrine does not bear a substantial relationship to the goal it was designed to protect. Therefore it fails to meet the test this Court originally outlined for marital classifications in *Eisenstadt*, and is insufficient to withstand a challenge under the Equal Protection Clause.

B. PRESERVATION OF MATRIMONIAL HARMONY

The primary justification for interspousal immunity is the preservation of matrimonial harmony. This Court in abrogating the common law privilege against adverse spousal testimony in criminal cases noted that the ancient foundations for allowing the accused to assert the privilege have long disappeared. *Trammel v. United States*, 100 S. Ct. 906 (1980).

Like interspousal immunity, the ancient foundation for the privilege in criminal cases rests upon the preservation of matrimonial harmony, 8 Wigmore, §2228, and like the situation found in *Trammel*, the privilege is more likely to frustrate justice than to foster family peace. *Trammel*, 100 S.Ct. at 913.

This reason for interspousal immunity has been severely criticized by legal scholars (like the privilege in *Trammel)* and its justification is unpersuasive. Certainly with respect to intentional torts, for example assault or battery, it is illogical to assume that by barring a civil suit you will preserve domestic tranquility, since the tranquility sought to be protected is

already shattered. 1/

Furthermore it make little sense that a spouse who is so angered that he or she will sue his counterpart, will be soothed and deterred by the denial of her legal remedy. Prosser, Torts § 122 (4th ed. 1971).

In today's society as opposed to fifty years ago, a woman has a separate legal identity and is no longer destined for the home and the rearing of the family. *Stanton v. Stanton*, 421 U.S. 7 14, 15 (1975); *Taylor v. Louisiana* 419 U.S. 522, 535 n.17 (1975). The abolition of the fictional unity between husband and wife allows the wife to sue her husband in non-tort litigation. Certainly there is nothing in the nature of tort actions that make them more disturbing to domestic tranquility than property or criminal proceeding. 47 Tenn. L. Rev. 123, 130 (1979). By allowing other types of litigation between husband and wife, the State of Florida has clearly abandoned the purpose of interspousal immunity insofar as preservation of matrimonial harmony is concerned. *Eisenstadt*, 405 U.S. at 448. Besides divorce, the other types of litigation allowed by the State of Florida, so riddle interspousal immunity with exceptions, that it cannot reasonably be regarded as protecting

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1/ In *Trammel* the Court wrote:

> When one spouse is willing to testify against the other in a criminal proceeding whatever the motivation . . . Their relationship is most certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve.

This is obviously true in an interspousal suit for assault with the only difference being one of characterization, that is tort versus a criminal action. Both suits will be equally disruptive, yet only one is allowed.

matrimonial harmony. Id at 449. 2/

When weighing the Equal Protection Clause against the possibility of avoiding intrafamily controversy, this Court has held the latter insufficient to support a gender classification. *Reed v. Reed*, 404 U.S. 71, 77 (1971). In *Reed*, the mother of her deceased son filed a petition in Probate Court seeking her appointment as administratrix of her son. The father files a competing petition and under the statutory preference afforded to the father's decedents, he was appointed the administrator of her son's estate. One justification for the automatic preference was the avoidance of intrafamily controversy, but despite its positive value, the automatic preference was the avoidance of intrafamily controversy, but despite its positive value, the automatic preference was held to be arbitrary and contrary to the Equal Protection Clause of the Fourteenth Amendment. *Reed*, 404 U.S. at 76.

The difference in the *Reed* decision and the instant case are minimal. 3/ Here, interspousal tort suits are banned to preserve intrafamily or matrimonial harmony. While in *Reed*, women are excluded from administering estates for the identical reason. Just as intrafamily or marital harmony is insufficient to support a gender classification, it must also fail to support a marital classification.

2/ Florida abolished the fictional unity in the Married Women's Property Act of 1943 which gave her the same rights as if she was unmarried to sue in a Court of law. The Petitioner's argument is not that Married Womens Act itself abrogates interspousal immunity contrary to *Thompson v. Thompson*, 218 U.S. 611 (1910), but that the availability of other types of lawsuits are contrary to Florida's express purpose for interspousal immunity.

3/ In *Reed*, the State of Oregon sought to preserve marital harmony by automatically allowing husbands to administer the estate of his children. In so doing the State prevented lawsuits between a husband and his wife in an effort to foster domestic tranquility. There is no reason to suspect that a suit after the loss of a child would be less disruptive than a tort suit between husband and wife.

To survive a constitutional challenge under the Fourteenth Amendment, interspousal immunity must bear a substantial relationship to the preservation of marital harmony. This Court made rule does not further its object by barring an action in tort, but yet allowing a spouse to sue one another under the same factual scenario in a non-tort action, or by denying an angered spouse a legal remedy when he or she is the victim of an intentional or negligent act. As such, the second justification for this antiquated doctrine also fails to meet the standard established by *Eisenstadt.*

2. The Florida Supreme Court erred in upholding the doctrine of interspousal immunity which denied married couples access to the Court contrary to the Fifth and Fourteenth Amendments to the United States Constitution.

The Courts serve as the forum for dispute settlement in our society. It is upon this concept that the Fifth and later the Fourteenth Amendments were drafted as the cornerstone of due process in the operation of the legal system. *Boddie v. Connecticut*, 401 U.S. 371, 375 (1970).

Due Process requires at a minimum, absent a countervailing state interest of overriding significance, that all persons should be equally entitled to have access to the Courts for the protection of their person and property. *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313 (1950).

When a state denied a group of individuals similarly situated access to the Court, and yet allows others access, not only is the Due Process Clause of the Fifth Amendment violated, but so is the Equal Protection Clause of the Fourteenth amendment. U.S. CONST. amend V; U.S. CONST. amend XIV; *Yick Wo v. Hopkins*, 118 U.S. 356 369 (1885). Although both amendments utilize the identical analytical framework, the Equal Protection Clause places an additional guaranty beyond

the requirement of Due Process in preventing discrimination, oppression or inequality of all persons similarly situated who seek access to the Court. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1975).

Therefore, for interspousal immunity to survive a challenge under the Due Process Clause, a counterveiling state interest of overriding significance must exist; Id. at 100; and to survive a challenge under the Equal Protection Clause, interspousal immunity must not place an additional burden on persons similarly situated who seek access to the Court. Id. at 100.

Here, the State of Florida asserts the possibility of fraudulent suits and the preservation of matrimonial harmony as sufficient to deny the Petitioner her rights of access to the Court under the Due Process Clause. As indicated in the Petitioner's initial reason for granting certiorari, the doctrine of interspousal immunity does not bear a substantial relationship to either of the aforementioned goals. In addition no other interest has been advanced by the State to justify such a serious denial of one of our most fundamental rights, access to the courts. Therefore, the State of Florida has not stated a counterveiling interest which is sufficient to withstand a constitutional challenge under the Due Process or the Equal Protection Clause of the Constitution.

Experience has shown that the abrogation of interspousal immunity does not open the Court to trivial or fraudulent suits. Furthermore, the State's goals in preserving matrimonial harmony cannot be served by denying address in tort actions, but yet allowing a spouse to sue his or her counterpart under the same factual scenario in criminal, contract, or other proceedings.

This Court recognized in *Trammel* that when the original rationale for a Court-fashioned rule have long disappeared that it is time for the rule's creator to destroy it. *Trammel*, 100 S.

Ct. at 911. As with the common law privilege in *Trammel*, the common law doctrine of interspousal immunity has outlived its usefullness. Therefore it whould be abrogated so that a spouse is allowed access to a court of law to seek redress for injuries inflicted upon her by her husband. To decide otherwise slams the courthouse door shut to all individuals who for the sole reason that they are married cannot be compensated for injuries sustained intentionally or by the negligent act of either spouse.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Florida Supreme Court.

Respectfully submitted,

Lawrence B. Friedman pro se

LAWRENCE B. FRIEDMAN
1875 N.E. 163rd Street
North Miami Beach, Florida 33162

Counsel for Petitioner

May 17, 1980

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this *21st* day of May, 1980, three (3) copies of the Petition for a Writ of Certiorari were mailed, postage prepaid, to JOE KASHI, P. O. Box 14723, Fort Lauderdale, Florida 33302, Counsel for the Respondents.

I FURTHER CERTIFY that all parties required to be served have been served.

By: Lawrence B. Friedman per m.a.s.

LAWRENCE B. FRIEDMAN, ESQ.
1875 N.E. 163rd Street
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Counsel for the Petitioner

APPENDIX

IN THE SUPREME COURT OF FLORIDA
THURSDAY, FEBRUARY 21, 1980

RUTH RAISEN,
Petitioner,

vs.

PHILIP RAISEN, ET AL.,
Respondents.

CASE NO. 54,838
DCA Case No. 77-1058

On consideration of the motion for rehearing filed by attorneys for petitioner,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ENGLAND, C.J., BOYD, OVERTON, ALDERMAN and MC DONALD, JJ., Concur ADKINS and SUNDBERG, JJ., Dissent

On consideration of the motion to dismiss motion for rehearing filed by attorneys for respondents,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ENGLAND, C.J., ADKINS, BOYD, OVERTON, SUNDBERG and McDONALD, JJ., Concur ALDERMAN, J., Dissents

A True Copy

TEST:

Sid J. White (Signed)
Sid J. White
Clerk Supreme Court

cc: Hon. Clyde L. Heath, Clerk
Hon. Robert E. Lockwood, Clerk
Hon. John G. Ferris, Judge

Lawrence B. Friedman, Esquire
of Friedman & Robbins
Joseph S. Kashi, Esquire
of Grimmett, Conrad, Scherer
& James
Larry Klein, Esquire

RUTH RAISEN, Appellant,
v.
Philip RAISEN and Insurance Company of North America, Appellees.
No. 77-1058
District Court of Appeal of Florida, Fourth District.
July 19, 1978.

Wife sued husband and his insurer for damages arising out of husband's operation of automobile. The Circuit Court, Broward County, John G. Ferris, J., sustained motion to dismiss complaint on ground of interspousal immunity, and wife appealed. The District Court of Appeal, Downey, C.J., held that action was barred by doctrine of interspousal immunity.

Judgment affirmed and question certified.

Dauksch, J., concurred specially with opinion.

Husband and Wife Key 205(2)

Action brought by wife against husband and his insurer for damages arising out of husband's operation of automobile in an allegedly negligent fashion was barred by doctrine of interspousal immunity, despite allegations of complaint that traditional reasons giving rise to concept of interspousal immunity did not exist under facts of the case.

Lawrence B. Friedman of Friedman & Robbins, North Miami Beach, for appellant.

Joseph S. Kashi of Druck, Grimmett, Scherer & James,

Fort Lauderdale, Florida, for appellees.

DOWNEY, Chief Judge.

The individual parties to this appeal are husband and wife and the issue involved is the application vel non of the interspousal immunity doctrine.

The appellant wife sued appellee husband for damages arising out of his operation of an automobile in such a negligent fashion as to injure the wife. The trial court sustained a motion to dismiss the complaint on the grounds of interspousal immunity and a final judgment was entered for appellees.

Appellant contends the trial court erred in dismissing this cause because 1) the allegations of the complaint demonstrate that the interspousal immunity doctrine is not applicable to this case, and 2) application of the interspousal immunity doctrine in such a way as to prohibit appellant from maintaining this suit violates her constitutional rights of due process and equal protection.

The complaint alleged, among other things, that the parties have lived together as husband and wife for thirty-seven years and will continue to do so; the maintenance of this suit will not disrupt the peace and harmony of their home and marriage; the parties have not conspired to promote a fraudulent or collusive claim; the suit is not trivial but a result of severe injuries inflicted upon plaintiff; and the defendant insurance company is the real party in interest.

Appellant contends that on motion to dismiss the well pleaded allegations of her complaint must be taken as true. Thus, appellant argues that the traditional reasons giving rise to the concept of interspousal immunity are not existent in this case and that the complaint states a cause of action entitling appellant to relief. Appellant concludes by citing Prosser

and numerous other authorities 1/ which suggest the doctrine is an anachronism which has long outlived its time.

Be that as it may, we are constrained to follow respectable precedent which indicates the doctrine of interspousal immunity is still viable in Florida. 2/ Any such change in the law as appellant urges is more properly the function of the Legislature or the Supreme Court. However, inasmuch as the question is a constantly recurring one and is one of great public interest, we certify the following question to the Supreme Court of Florida as one of great public interest:

> Does the doctrine of interspousal immunity preclude a tort action between husband and wife in all cases or will such an action lie if it is alleged and proven that none of the traditional reasons supporting interspousal immunity are applicable?

The judgment for which this appeal is perfected is affirmed.

AFFIRMED, question certified.

MOORE, J., concurs.

DAUKSCH, J., concurs specially with opinion.

DAUKSCH, Judge, concurring specially:

I concur with the court's opinion as anounced by Judge

1/ Prosser, Law of Torts, § 122 (4th Ed. 1971): *Bonner v. Williams*, 370 F.2d 301 (5th Cir. 1966); *Klein v. Klein*, 58 Cal. 2d 692, 26 Cal. Rpt. 102, 376 P. 2d 70 (1962).

2/ *Bencomo v. Bencomo*, 200 So.2d 171 (Fla 1967); *Horton v. Unigard Ins. Co.*, 355 So.2d 154 (Fla. 4th DCA 1978); *Blanton v. Blanton*, 354 So. 2d 430 (Fla. 4th DCA 1978).

Downey and add my thought that it may be time our Supreme Court reconsider the entire interfamilial immunity doctrine in light of social development and change over the years since it was last considered.

WEST KEY NUMBER SYSTEM

RUTH RAISEN, Petitioner,
v.
Philip RAISEN and Insurance Company of North America, Respondents.
No. 54838.
Supreme Court of Florida.
Dec. 20, 1979.
Rehearing Denied Feb. 21, 1980.

Wife sued husband and his insurer for damages arising out of husband's operation of automobile. The Circuit Court, Broward County, John G. Ferris, J., sustained motion to dismiss complaint on ground of interspousal immunity, and the District Court of Appeal affirmed, 370 So. 2d 1148. On writ of certiorari granted to wife; the Supreme Court, Alderman, J., held that the action was barred by doctrine of interspousal immunity.

Decision of District Court of Appeal approved.

McDonald, J., concurred specially and filed opinion.

England, C. J., and Adkins and Sundberg, J.J., dissented and filed opinion.

Husband and Wife Key 205 (2)

Action brought by wife against husband and his insurer for damages arising out of husband's operation of automobile in an allegedly negligent fashion was barred by doctrine of interspousal immunity, despite allegations of complaint that traditional reasons given rise to concept of interspousal immunity did not exist under facts of the case.

Lawrence B. Friedman of Friedman & Robbins, North Miami Beach, for petitioner.

Joseph S. Kashi of Grimmett, Scherer & James, Fort Lauderdale, for respondents.

Larry Klein, West Palm Beach, for The Academy of Florida Trial Lawyers, amicus curiae.

ALDERMAN, Justice.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Fourth District, in *Raisen v. Raisen*, 370 So.2d 1148 (Fla. 4th DCA 1978). The district court has certified the following question for our consideration:

> Does the doctrine of interspousal immunity preclude a tort action between husband and wife in all cases or will such an action lie if it is alleged and proven that none of the traditional reasons supporting interspousal immunity are applicable?

Material to the disposition of this cause is the broader question posed by the parties of whether this court should abrogate the doctrine of interspousal immunity in Florida. We conclude that valid policy reasons justifying the retention of the doctrine still exist.

Mrs. Raisen sued her husband and his insurer for damages arising out of his operation of an automobile in an allegedly negligent manner so as to cause her injury. She alleged that this suit would not disturb the domestic peace of her home and marriage and that she and her husband have not conspired to promote a fraudulent or collusive lawsuit. The trial court dismissed the complaint on the basis of interspousal immunity

and entered judgment for Mr. Raisen and his insurer. The district court affirmed.

Mrs. Raisen urges that we abrogate the common law doctrine of interspousal immunity because the reasons for this rule have ceased to exist. In response, Mr. Raisen and his insurance carrier argue that the underlying justifications for this doctrine retain their vitality. They contend that with widespread insurance coverage, the probability of collusion and fraud is increased and that, unquestionably, an adversary tort contest between spouses will have an upsetting effect on domestic tranquility.

Orginally a part of the common law of England, interspousal tort immunity was adopted into the law of Florida in 1829 by the enactment of what is now section 2.01, Florida Statutes (1977). 1/ *Corren v. Corren*, 47 So.2d 774 (Fla. 1950). As a general rule, that part of the common law codified by section 2.01 should be changed through legislative enactment and not by judicial decision. Only in very few instances and with great hesitation has this Court modified or abrogated any part of the common law enacted by section 2.01, and then only where there was a compelling need for change and the reason for the law no longer existed. *E. g., Hoffman v. Jones*, 280 So.2d 431. (Fla. 1973).

In *Corren v. Corren*, we considered the changes that had occurred since 1829 and concluded that the legislature had not

---

1/ Section 2.01, Florida Statutes (1977), provides:

Common law and certain statutes declared in force. The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state.

intended by any of its enactments to abrogate interspousal tort immunity. At that time, we admonished the legislature that it would be assuming a grave reaponsibility if it were, by legislative enactment, to allow each spouse to treat the other as a stranger so far as legal rights are concerned, and we advised that if it should do so, the language proclaiming this revolutionary change should be positive and unambiguous. 47 So.2d at 776. Since our decision in *Corren*, the legislature has not spoken in positive and unambiguous language to abrogate interspousal tort immunity.

Convincing arguments for the continued validity of this law are found in various decisions of this Court over the last thirty years. In *Corren*, we rejected the argument that the Married Women's Property Act destroyed the unity of marriage and explained:

> [T]he so-called emancipation act did not so affect the marriage relationship that the husband and wife were thenceforward permitted to go their separate ways, but instead were still mates residing in a common home, each making in his own way a contribution to the marriage venture.
>
> As we have already commented, this fundamental relationship does not seem directly affected by the provisions of organic and statutory law with reference to the woman's dominion over her own property, and we feel that we would have to resort to the illogic to hold that there can be found in any of them the implication even that she might sue her spouse for injuries resulting from the negligent operation of his automobile.

47 So.2d at 775. Additionally, referring to the marital discord that could result from an embittering and distressing interspousal tort action, we said:

> When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home. Certainly the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of offspring blighted if bickerings blossomed into law suits and conjugal disputes into vexatious, if not expensive, litigation.

47 So.2d at 776.

Subsequently, in *Bencomo v. Bencomo*, 200 So.2d 171 (Fla. 1967), we acknowledge the continued validity and soundness of the doctrine, reiterated the justification for its existence, and reaffirmed that, in the absence of a constitutional or statutory provision changing the common law, a wife could not maintain an action against her husband for a personal tort. In *Gaston v. Pittman*, 224 So.2d 326 (Fla. 1969), we recognized the validity of the public policy arguments supporting the doctrine: that interspousal tort actions disturb domestic tranquility; cause marital discord and divorce; cause fictitious, collusive, and fraudulent claims; cause a rise in liability insurance; and promote trivial actions. Again, in *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970), we acknowledge as the established policy of this state that suits will not be allowed among members of a family unit for tort, and we said "[t]he purpose of this policy is to protect family harmony and resources." 237 So.2d at 145. Our recent decision in *Shor v. Paoli*, 353 So. 2d 825 (Fla. 1977), although holding that interspousal tort immunity did not control over the Uniform Contribution Among Joint Tortfeasor's Act, did not affect the continued vitality of the doctrine. The continuing validity of this doctrine has also been recognized by a number of recent decisions of the district courts of appeal. *Vinci v. Gensler*, 269 So.2d 20

Fla. 2d DCA 1972); *Mims v. Mims*, 305 So.2d 787 (Fla. 4th DCA 1974); *Heaton v. Heaton*, 304 So.2d 516 (Fla. 4th DCA 1975); *Planton v. Planton*, 354 So.2d 430 (Fla. 4th DCA 1978); *Horton v. Unigard Insurance Co.*, 355 So.2d 154 (Fla. 4th DCA 1978), *cert. dismissed*, 373 So.2d 459 (Fla. 1979).

There is a reciprocal and often antagonistic relationship between promotion of peace and harmony in the marital relationship and avoidance of fraudulent or collusive claims. A truly adversary tort lawsuit between husband and wife, by its very nature, would have an upsetting and embittering effect upon domestic tranquility. In such cases, there is little likelihood of fraud and collusion, but there is a great probability that the marriage relationship will be adversely affected. On the other hand, if the lawsuit is not adversary and there is no real conflict of interest between the spouses, the peace and harmony of the marriage is not threatened, but there is a great probability of fraudulent or collusive claims. This is particularly true where the defendant spouse is insured and both spouses will benefit if the plaintiff spouse wins the lawsuit and enforces the claim against the insurance company. Under such circumstances, it is unrealistic to think that the defendant spouse will do all within his or her power to defeat the claim of the plaintiff spouse. We expect too much of human nature if we believe that a husband and wife who sleep in the same bed, eat at the same table, and spend money from the same purse can be truly adversary to each other in a lawsuit when any judgment obtained by the plaintiff spouse will be paid by an insurance company and will ultimately benefit both spouses.

Adversary tort lawsuits between spouses have an upsetting and embittering effect upon domestic tranquility and the marital relationship. But non-adversary lawsuits that do not disturb the peace and harmony of the marriage encourage fraudulent and collusive claims, particularly where a third-party insurance company must pay any judgment awarded. Florida's solution to this dilemma since 1829 has been interspousal tort immunity. This is still a viable solution. There have been many changes

in Florida since 1829, but the policy reasons justifying interspousal tort immunity still exist.

Accordingly, we hold that the common law doctrine of interspousal tort immunity is still viable in Florida and that it precludes a tort action between husband and wife in all cases. The decision of the district court affirming the trial court's dismissal of the complaint is therefore approved.

It is so ordered.

BOYD, OVERTON and McDONALD, JJ., concur.

McDONALD, J., concurs specially with an opinion.

ENGLAND, C. J., and ADKINS and SUNDBERG, JJ., dissent with an opinion.

McDONALD, Justice, specially concurring.

I concur in the conclusion that this Court should not abolish the doctrine of interspousal immunity. I am not greatly concerned with the specter of fraudulent and collusive claims against insurance companies, since I feel that our judicial system could ferret those out. I am much more concerned by any intrusion which may adversely affect the marriage relationship. Litigation between spouses would be such an intrusion.

It has been suggested that if the doctrine of interspousal immunity is retained, the application thereof should be relaxed to allow an action for tort when the tortious conduct is covered by liability insurance. The real party in interest, it is urged, is not the spouse but the insurance carrier. Reasonable men may agree that this is a viable alternative - - but I agree that should this distinction be made, it should be done by the legislature rather than this Court.

ENGLAND, Chief Justice, and ADKINS and SUNDBERG,

Justices, dissenting.

We dissent.

At least twenty-eight jurisdictions have recognized the need to make a change in permitting one spouse to maintain an action against the other. Alabama, *Bennett v. Bennett*, 224 Ala. 335, 140 So. 378 (1932); *Bonner v. Williams*, 370 F.2d 301 (5th Cir. 1966); Alaska, *Armstrong v. Armstrong*, 441 P.2d 699 (Alaska 1968); Arkansas, *Leach v. Leach* 227 Ark. 599, 300 S.W.2d 15 (1957); California,*Klein v. Klein*, 58 Cal.2d 692, 26 Cal. Rpt. 102, 376 P.2d 70 (1962); Colorado, *Rains v. Rains*, 97 Colo. 19, 46 P.2d 740 (1935); *McSwain v. United States*, 291 F.Supp. 386 (E.D. Pa. 1968) (applying Colorado law); Connecticut, *Menczer v. Menczer*, 160 Conn. 563, 280 A.2d 875 (1971); Idaho, *Rogers v. Yellowstone Park Co.*, 97 Idaho 14, 539 P.2d 566 (1974); Indiana, *Brooks v. Robinson*, 259 Ind. 16, 284 N.E.2d 794 (1972); Kentucky, *Arnett v. Thompson*, 433 S.W.2d 109 (Ky. 1968); *Layne v. Layne*, 433 S.W.2d 116 (Ky. 1968); Massachusetts, *Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1971); Michigan, Hosko v. Hosko*, 385 Mich. 39, 187 N.W.2d 236 (1971); Minnesota, *Beaudette v. Frana*, 285 Minn. 366, 173 N.W.2d 416 (1969); Nevada, *Rupert v. Stienne*, 90 Nev. 397, 528 P.2d 1013 (1974); New Hampshire, *Thompson v. Thompson*, 105 N.H. 86, 193 A.2d 439 (1963); *Schneider v. Schneider*, 110 N.H. 70, 260 A.2d 97 (1969); *Taylor v. Bullock*, 111 N.H. 214, 279 A.2d 585 (1971); New Jersey, *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970); *Merenoff v. Merenoff*, 76 N.J. 535, 388 A.2d 951 (1978); New Mexico, *Maestas v. Overton*, 87 N.M. 213, 531 P.2d 947 (1975) (intentional tort); New York, *Jacobs v. United States Fidelity & Guaranty Co.*, 2 Misc. 2d 428, 152 N.Y.S.2d 128 (Sup. Ct. 1956); *Keller v. Greyhound Corp.*, 41 Misc. 2d 255, 244 N.Y.S.2d 882 (Sup. Ct. 1963); North Carolina, *La Chance v. Service Trucking Co.*, 215 F.Supp. 162 (D. Md. 1963) (applying North Carolina Law); North Dakota, *Fitzmaurice v. Fitzmaurice*, 62 N.D. 191,

242 N.W. 526 (1932); Oklahoma, *Courtney v. Courtney*, 184 Okl. 395, 87 P.2d 660 (1938); Rhode Island, *Digby v. Digby*, 388 A.2d 1 (R.I. 1978); South Carolina, *Oshiek v. Oshiek*, 244 S.C. 249, 136 S.E.2d 303 (1964); *Algie v. Algie*, 261 S.C. 103, 198 S.E.2d 529 (1973); South Dakota, *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266 (1941); Virginia, *Surratt v. Thompson*, 212 Va. 191, 183 S.E.2d 200 (1971); Vermont, *Richard v. Richard*, 131 Vt. 98, 300 A.2d 637 (1973); Washington, *Freehe v. Freehe*, 81 Wash.2d 183, 500 P.2d 771 (1972); West Virginia, *Coffindaffer v. Coffindaffer*, 244 S.E. 2d 338 (W. Va. 1978); and Wisconsin, *Haumschild v. Continental Casualty Co.*, 7 Wis.2d 1301, 95 N.W.2d 814 (1959).

These decisions recognize that the reasons for the common law rule no longer exist. Chief among the reasons traditionally assigned as justification for the doctrine of interspousal immunity are: (1) the legal unity of the husband and wife recognized at common law; (2) the promotion of peace and harmony in the home; and (3) the avoidance of fraudulent or collusive claims. Respondents argue that these justifications are still valid. They say, in fact, that with widespread insurance coverage, the fear of collusion and fraud is intensified. Respondents also correctly point out that the doctrine of interspousal immunity is well established in this state and has been upheld in our recent holdings. See *Orefice v. Albert*, 237 So.2d 142 (Fla. 1970); *Bencomo v. Bencomo*, 200 So.2d 171 (Fla. 1967).

1. UNITY

Petitioner first urges that the common law unity concept which prohibited suits between spouses is no longer viable. We agree. Since 1943, with the passage of the Married Women's Property Act, now chapter 708, Florida Statutes (1977), a married woman in Florida has been empowered to manage and control her separate property and to enter into agreements

and contracts with her husband. 2/ She may also enforce her contract and property claims by suing her husband. *Dodson v. National Title Insurance Co.*, 159 Fla. 371, 31 So.2d 402 (1947). The legal unity concept prohibiting suits between spouses was seriously eroded by the passage of this statute permitting interspousal suits in a wide range of cases. With the passage of chapter 708, and in view of the expanded legal status of women, the common law unity concept is no longer a valid justification for the doctrine of interspousal tort immunity. By rejecting the common law unity concept we do not disparage the spiritual and emotional unity which has been hold to exist by virtue of the marriage bond. As noted by the

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2/ § 708.08, Fla. Stat. (1977) provides:

(1) Every married woman is empowered to take charge of and manage and control her separate property, to contract and to be contracted with, to sue and be sued, to sell convey, transfer, mortgage, use, and pledge her real and personal property and to make, execute, and deliver instruments of every character without the joinder or consent of her husband in all respects as fully as if she were unmarried. Every married woman has and may exercise all rights and powers with respect to her separate property, income, and earnings and may enter into, obligate herself to perform, and enforce contracts or undertakings to the same extent and in like manner as if she were unmarried and without the joinder or consent of her husband. Any claim or judgment against a married woman shall not be a claim or lien against her inchoate right of dower in her husband's separate property. All conveyances, contracts, transfers, or mortgages of real property or any interest in it, executed by a married woman without the joinder of her husband after the effective date of the 1968 Constitution of Florida, are as valid and effective as through the husband had joined.

(2) Any married woman having a right of dower in real property may relinquish it by joining in a conveyance or mortgage of the property or by a separate instrument without the joinder of her husband, executed in the same manner as conveyances.

Washington Supreme Court in a case abrogating the doctrine of interspousal immunity in that state:

> The "supposed unity" of husband and wife, which serves as the traditional basis of interspousal disability, is not a reference to the common nature or loving oneness achieved in a marriage of two free individuals. Rather, this traditional premise had reference to a situation, coming on from antiquity, in which a woman's marriage for most purposes rendered her a chattel of her husband.

Freehe v. Freehe, 81 Wash. 2d 183, 500 P.2d 771, 773 (1972). It is the common law concept of legal unity which rendered the wife a chattel of her husband, which can no longer operate to preclude one spouse from suing the other for tortious injury.

II. PEACE AND HARMONY

We also agree with petitioner that domestic tranquility is no longer realistically served by the existence of the doctrine. As we initially noted, in this state spouses are free to sue each other for breach of contractual obligations and to protect separate property rights, but may not bring interspousal actions

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2/ Continued

§708.09, Fla. Stat. (1977), provides:

Every married woman may enter into agreements and contracts with her husband, may become the partner of her husband or others, may give a power of attorney to her husband, and may execute powers conferred upon her by her husband, including the power to execute and acknowledge all instruments, including relinquishments of dower, conveying, transferring, or encoumbering property, or any interest in it, owned by her, or by herself and her husband as tenants by the entirety, or by her husband. All powers of attorney heretofore executed by a wife to her husband and vice versa, and the execution of all documents executed thereunder, are hereby validated and confirmed.

for tortious injury. *Bencomo v. Bencomo; Dodson v. National Title Insurance Co.*, sections 708.08 and 708.09, Florida Statutes, (1977). The inconsistency in this approach was identified in a dissent to an opinion of the United States Supreme Court construing a District of Columbia women's property act to permit interspousal actions in tort only for the recovery of property. Justice Harlan dissented, noting that such a construction would allow:

> [A] married woman to sue her husband separately, in tort, for the recovery of her property, but deny . . . . her the right or privilege to sue him separately, in tort, for damages arising from his brutal assaults upon her person.

Thompson v. Thompson, 218 U.S. 611, 623, 31 S.Ct. 111, 114, 54 L. Ed. 1180 (1910). It is not logical to permit one and not the other. If marital tranquility is preserved when lawsuits are permitted between spouses over property and contract rights, we see no reason to conclude that tort actions between spouses should destroy it. We find support for this view in Dean Prosser's criticism of the doctrine. He writes:

> The chief reason relied upon by all these courts, however, is that personal tort actions between husband and wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be soothed and deterred from reprisals by denying her the legal remedy - and this even though she has left him or divorced him for that very ground, and although the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property, or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

Prosser, *Law of Torts*, section 122, page 863 (4th Ed. 1971). We agree, and conclude that the doctrine of interspousal tort immunity cannot be validly justified on grounds that it serves to maintain marital peace and harmony.

III. FRAUD

A third argument often urged in support of the doctrine is that to permit suits between spouses would encourage fraudulent claims against insurers. Recognizing that the possibility of fraud exists in any lawsuit, we reject the contention as a valid justification for denying one spouse compensation for injuries negligently inflicted by the other. Support for our position is found in the responses of other states to the same argument.

In rejecting the common law immunity rule, the Supreme Court of Californis noted:

> It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual.

Klein v. Klein, 58 Cal.2d 692, 26 Cal. Rptr. 102, 376 P.2d 70 (1962).

In a decision abolishing the common law interspousal tort immunity in Indiana, the Supreme Court of that state first noted that, "[t]he possibility of fraud and collusion exists in all litigation." *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972). The court continued:

> However, we are not convinced that the danger is so great when the plaintiff and defendant are also husband

> and wife that judicial relief should be summarily denied. Furthermore, it should not be overlooked that the testimony of both parties will be extremely vulnerable to impeachment at trial on the grounds of bias, interest and prejudice. The trial court's responsibility, indeed, its duty, to properly instruct the jury on the credibility of witnesses and the rules governing the weight of evidence will remain unchanged, and, as was stated in *United States v. Freeman* (2d Cir. 1966), 357 F.2d 606, 620, " . . . it cannot be presumed that juries will check their common sense at the courtroom door."

Id., at 797.

The Washington Supreme Court rejected the same argument with this reasoning:

> [T]he fact that there may be greater opportunity for fraud or collusion in one class of cases than another does not warrant courts of law in closing the door to all cases of that class. . . . . Courts will not immunize tort feasors from liability in a whole class of cases because of the possibility of fraud, but will depend upon the legislature to deal with the problem as a question of public policy.

Freehe v. Freehe, 500 P.2d at 775 (quoting *Borst v. Borst*, 41 Wash. 2d 642, 251 P.2d 149, 155 (1952)).

Judge Liles, dissenting in *Vinci v. Gensier*, 269 So.2d 20 (Fla. 2d DCA 1972), summarizes our response to the concern over fraud in interspousal tort litigation. He writes:

> Some cases, in addition to maintaining family unity and harmony, rely on the danger of fraud and collusion. This, I think, denies the fact that judges are able to

detect collusion and fraud when they see it. It also overlooks the fact that lawyers are officers of the court and practice pursuant to an oath against bringing such suits and a canon of ethics which prohibits such action.

. . . . .

. . . I further believe that the courts are capable of distinguishing between a fraudulent raid on a treasury of an insurance company and legitimate claims of a wife or child where the benefit of liability protection has been purchased by the husband and father. I cannot believe that the father purchased this insurance policy to protect all other wives and children but not his own.

Id. at 21-22.

These arguments persuade us that the fear of fraud and collusion in interspousal suits for tort damages is not well founded. We reject that consideration as a legitimate justification for preserving the interspousal immunity doctrine.

Having concluded that the traditional reasons for the doctrine are not sufficiently persuasive to justify its continued operation, we would join the many other states that have totally or partially abrogated the doctrine.

In our opinion *Bencomo v. Bencomo*, 200 So.2d 171 (Fla. 1967) and *Corren v. Corren*, 47 So. 2d 774 (Fla. 1950) should be overruled and the doctrine of interspousal tort immunity should be abrogated so as to permit a married person to sue his or her spouse for any torts committed by the marital partner.

WEST KEY NUMBER SYSTEM

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-373

DONALD JONES, *Petitioner,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 4, 1979

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	2
Statement of the case and facts	3
Reasons for granting the writ	9
1. The Decision Below Conflicts With This Court's Decision In *Remmer v. United States*, 347 U.S. 227 (1954), *appeal after remand*, 350 U.S. 377 (1956) And With The Court Of Appeals Decision In *Marshall v. United States*, 436 F.2d 155 (D.C.Cir. 1971)	9
2. The Fifth Circuit Incorrectly Held That This Court's Decisions In *Michigan v. Tyler*, 436 U.S. 499 (1978) And *Mincey v. Arizona*, 437 U.S. 385 (1978) Are Not Retroactive	15
Conclusion	21
Appendix	1a

CITATIONS

CASES:

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 15, 16, 18, 20

Burnside v. Eastern Airlines, Inc.,
519 F.2d 1127 (5th Cir. 1975) 14

Chimel v. California,
395 U.S. 753 (1969) 17, 19, 20

Edwards v. Cook,
566 F.2d 960 (5th Cir. 1978) 14

Marshall v. United States,
436 F.2d 155 (D.C.Cir. 1971) 9, 12, 13, 15

Michigan v. Tyler,
436 U.S. 499 (1978) 2, 8, 15, 16, 17, 20

Mincey v. Arizona,
437 U.S. 385 (1978) 2, 8, 15, 16, 17, 18, 19, 20

Remmer v. United States,
347 U.S. 227 (1954), *appeal after remand* 350 U.S. 377 (1956) 9, 10, 11, 12, 13, 14, 15

Rogers v. United States,
422 U.S. 35 (1975) 14

CITATIONS (Continued)

CASES: **Page**

Terry v. Ohio,
392 U.S. 1 (1968) 18, 19, 20

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 18, 19

United States v. Green,
474 F.2d 1385 (5th Cir. 1973) 7, 8

United States v. Herndon,
390 F.Supp. 1017 (S.D. Fla. 1975) 1, 6

United States v. Martinez,
526 F.2d 954 (5th Cir. 1976) 18

United States v. Ortiz,
419 U.S. 824 (1975) 18, 19

United States v. Peltier,
422 U.S. 531 (1975) 15, 18, 20

United States v. Shelton,
588 F.2d 1242 (5th Cir. 1978) 13

United States v. United States Gypsum Company,
438 U.S. 422 (1978) 14

STATUTES AND RULES:

28 U.S.C. §1254 2

Fed.R.Crim.P. 33 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No.

DONALD JONES, *Petitioner,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Donald Jones respectfully prays that a writ of certiorari issue to review the judgment, opinion and order on rehearing of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 20, 1979 and August 6, 1979.

OPINION BELOW

The opinion and order denying rehearing in the Court of Appeals, reported at 597 F.2d 485, appear in the appendix to this brief. The District Court rendered a written opinion on the search and seizure issue. *United States v. Herndon,* 390 F.Supp. 1017 (S.D.Fla. 1975).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 20, 1979. A timely petition for rehearing and timely petition for rehearing *en banc* were denied without opinion on August 6, 1979. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether a defendant's motion for new trial on the ground of juror misconduct should be denied, notwithstanding the rule that such misconduct is presumptively prejudicial, because the defendant failed to allege and prove that he acted with due diligence in asserting the misconduct?

2. Whether this Court's decisions in *Michigan v. Tyler,* 436 U.S. 499 (1978) and *Mincey v. Arizona,* 437 U.S. 385 (1978) are retroactive?

STATUTORY PROVISIONS INVOLVED

Fed.R.Crim.P. 33. NEW TRIAL

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a

new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within seven days after verdict or finding of guilty or within such further time as the court may fix during the seven-day period.

STATEMENT OF THE CASE AND FACTS

Donald Jones was convicted by a jury of multiple offenses relating to the operation of a whiskey distillery. Three days after the verdict, one of the jurors contacted the trial judge and told him that she had been approached by petitioner's wife and a "a huge black man." (R. 197).[1] The court ordered the U.S. Attorney and an Alcohol, Tobacco and Firearms agent to interview all jurors to determine whether they had been similarly approached. (R. 198).

While the investigation was pending, petitioner moved for leave to interview the jurors. (R. 198). The trial court deferred ruling on the motion until the government completed its investigation. (R. 209).

Although the government's investigation was motivated by evidence that one or more of the jurors had been approached *after* the verdict, that investigation uncovered substantial evidence that someone had attempted to bribe one of the jurors *during* the trial. (R.

[1] "R" refers to the record on appeal in the United States Court of Appeals for the Fifth Circuit. "SR" refers to the supplemental record in that court.

218). It also established that at least one other juror was informed of the attempted bribe during the trial. (R. 219). The court set an immediate hearing "to ascertain whether jurors were improperly contacted, either during or immediately after the trial." (R. 213).

A hearing was held at which the jurors testified under oath. (SR. 1-55). The evidence was uncontradicted. It showed that someone had approached one of the jurors on more than one occasion during the trial and offered her a substantial sum of money to vote "not guilty" for petitioner. It showed that the contacted juror spoke with another juror on more than one occasion during the trial and informed the second juror of the attempted bribe. *There was no evidence that petitioner knew of, or had anything to do with, the attempted bribe.*

Notwithstanding uncontradicted evidence of a bribe attempt, the trial court denied petitioner's motion for new trial. The United States Court of Appeals for the Fifth Circuit affirmed. 597 F.2d 485 (5th Cir. 1979). It recognized the rule of "presumptive prejudice" previously established by this Court:

> It is well established law that an improper communication such as a bribe offer to a juror during the trial raises a presumption of prejudice and that a new trial must be ordered unless the government is able to bear its heavy burden of proving harmlessness. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L. Ed. 654, *appeal after remand,* 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956).

Id. at 487. The court refused to apply the rule, however, because petitioner did not prove that he acted with due diligence to discover the bribe attempt prior to the verdict:

> The [petitioner] had the burden of proving that this evidence was in fact newly discovered and that his failure to discover it prior to verdict was not due to his lack of diligence.
>
> * * *
>
> It is true that the evidence does not affirmatively establish the [petitioner's] involvement in the bribe offer. However, our decision is grounded on the total lack of evidence disproving such involvement or knowledge.
>
> * * *
>
> In this case [petitioner] presented no evidence whatever on the issues of his lack of knowledge or his due diligence . . . . All that [petitioner] has ever stated is that no evidence shows that [petitioner] was "connected with" the bribe offer. Thus [petitioner] never satisfied his burden of proof as movant and the *Remmer* presumption does not come into play.

Id. at 488, 489, n.4.

The government never asserted in the trial court or on appeal that petitioner's motion for new trial should be denied because petitioner failed to show that he acted with due diligence in discovering the bribe attempt. The

point was simply never an issue at the trial court's evidentiary hearing. On rehearing, petitioner moved the Fifth Circuit to remand the case to the trial court to afford petitioner an opportunity to prove that he acted with due diligence.[2] The Fifth Circuit denied the motion.

Petitioner had also filed a pretrial motion to suppress evidence seized on the premises. The facts are accurately detailed in the trial court's opinion. *United States v. Herndon,* 390 F.Supp. 1017 (S.D.Fla. 1975). The search and seizure began when state officers received an anonymous phone call reporting a shooting on the premises. They arrived at the farm and searched the house and barn for anyone involved in or injured by the shooting. Their search was cursory. They found nothing in the house. They saw an apparatus in the barn which they could not identify. They secured both the house and barn.

They called another state officer who arrived and searched the barn again. He identified the apparatus in the barn as a still. He summoned federal agents.

The federal agents performed a comprehensive search of the house and barn. They searched the entire house and inspected the contents of drawers and closets. They seized numerous items which were the subject of the motion to suppress.

The officers admitted that the area was secure after the initial search for victims of the shooting. Both the

[2]Petitioner attached to the motion his affidavit showing due diligence.

second state officer and the federal agents admitted that they had ample time and opportunity to obtain a warrant. But they did not obtain one. The trial court specifically rejected the government's argument

> that there was insufficient time for the ATF agents to obtain a warrant. In fact the evidence established that the ATF agents were called by the county officers at about 9:00 P.M., and that the magistrate could be reached until about 11:00 P.M. and was located only fifteen or twenty miles away. Furthermore, Federal Agent Harmon testified that the stills each weighed about 2800 pounds, and that he was not afraid that someone would walk away with a still. As for the smaller items in the house, the county police had surrounded the area. Therefore, *no emergency existed concerning the speed with which the federal agents arrived on the scene.*

390 F.Supp. at 1020-21. The trial court nevertheless held that the federal search was valid. It held that any right of privacy had been eliminated by the previous state search:

> The rationale which justified the federal search is that the subsequent intrusion does not significantly increase a pre-existing legitimate interference with a protected interest.

390 F.Supp. at 1021. The fourth amendment was designed to prevent unauthorized invasions of privacy. Based upon *United States v. Green,* 474 F.2d 1385 (5th Cir. 1973), the trial court reasoned that

> once that privacy is lawfully invaded, a subsequent search of the area already searched constitutes no additional invasion of privacy and therefore no violation of the Fourth Amendment.

390 F.Supp. at 1021. It concluded that the federal search without a warrant was proper because

> the federal authorities entered the premises pursuant to a call by the local authorities, and the search conducted by the federal agents was directly related to the objects discovered by the county officers.

390 F.Supp. at 1022.

The trial court's decision was entered before this Court's recent decisions in *Michigan v. Tyler,* 436 U.S. 385 (1978) and *Mincey v. Arizona,* 437 U.S. 385 (1978), which specifically reject the trial court's rationale. The Fifth Circuit refused to consider petitioner's claim that the trial court's decision was contrary to *Tyler* and *Mincey.* It concluded that *Tyler* and *Mincey* should not be applied retroactively. Instead, the "prevailing law" of the circuit, as stated in *United States v. Green,* 474 F.2d 1385 (5th Cir. 1973), should control.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With This Court's Decision In *Remmer v. United States*, 347 U.S. 227 (1954), *appeal after remand*, 350 U.S. 377 (1956) And With The Court Of Appeals Decision In *Marshall v. United States*, 436 F.2d 155 (D.C.Cir. 1971).

In *Remmer v. United States*, 347 U.S. 227 (1954), *appeal after remand*, 350 U.S. 377 (1956), this Court recognized the fundamental importance of a fair and impartial jury when it concluded that evidence of jury tampering raises a "presumption of prejudice" which entitles the defendant to a new trial unless overcome by the government's affirmative proof of harmlessness.

> The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

347 U.S. at 229. The Fifth Circuit recognized this presumption and the burden it places on the government, 597 F.2d at 487, but nevertheless proceeded to emasculate it by creating a "due diligence" requirement which shifted the burden of proof to the defendant.

The Fifth Circuit's newly created rule has a striking effect when viewed against the facts of this case. Once the government's investigation showed evidence of juror misconduct, the trial court ordered an evidentiary hearing "to ascertain whether jurors were improperly contac-

ted." (R. 213). The hearing which followed established precisely that. A juror had been bribed and at least one other juror had been aware of the bribe. There was no evidence that petitioner knew about the bribe or was involved in it. Neither the trial court nor the government at any time suggested that petitioner was required to prove "due diligence" at this hearing.

Application of *Remmer* mandated that petitioner was entitled to a new trial unless the government could prove that the bribe attempt was harmless. In fact, harmlessness was the only argument made by the government on appeal. But the Fifth Circuit never reached that issue. Instead, it concluded that petitioner had failed to meet the burden of proving "due diligence," a burden which was never placed on him before. The Fifth Circuit concluded that the absence of such evidence meant that the presumption of prejudice never arose. Under *Remmer,* it should have meant that the presumption of prejudice was never rebutted.

In *Remmer,* this Court held that the defendant was entitled to a new trial where someone approached a juror during trial and indirectly suggested the possibility of a bribe. When the defendant first filed his motion, the trial court denied it without holding an evidentiary hearing. The court of appeals affirmed on the ground that the trial court did not abuse its discretion. This Court reversed. It held that the improper contact was presumptively prejudicial. The defendant was entitled to a new trial unless the government could overcome the presumption. 347 U.S. at 229. It remanded the case to the trial court for an evidentiary hearing on the prejudice issue.

On remand, the trial court held that there was no prejudice. This Court again reversed. It concluded that there was no evidence to overcome the presumption of prejudice. 350 U.S. at 381. This Court held that the defendant was entitled to a new trial.

Remmer mandated reversal of this case for a new trial. Yet the Fifth Circuit circumvented *Remmer* and the burden of proof it imposed on the government. It viewed the appeal as one from a motion for new trial based on newly discovered evidence, although petitioner appealed the final judgment.

The Fifth Circuit held that petitioner had the burden of proving that the evidence of jury tampering was newly discovered and that failure to discover it prior to verdict was not due to his lack of diligence. 597 F.2d at 488-89. Yet the court also stated:

> It is true that the evidence does not affirmatively establish the appellant's involvement in the bribe offer. However, *our decision is grounded on the total lack of evidence disproving such involvement or knowledge.*

597 F.2d at 489, n.4.

Proving "due diligence" is no different than proving "harmfulness." Evidence that the defendant knew about the bribe attempt before the verdict but chose to do nothing would establish lack of due diligence. But such proof would also establish harmlessness, because the error would have been invited by the defendant. Under *Remmer,* however, that burden rests on the government, not the defendant. The fact that the government's

burden might be heavy[3] is no justification for shifting that burden back to the defendant under the guise of "due diligence."

The Fifth Circuit incorrectly applied the due diligence standard for another reason. The bribe attempt infringed petitioner's sixth amendment right to a fair and impartial jury. The due diligence standard does not apply to a newly discovered evidence claim of constitutional magnitude. *Marshall v. United States,* 436 F.2d 155 (D.C.Cir. 1971). In *Marshall,* the court of appeals reversed the trial court's holding that the defendant had to prove due diligence before he could obtain a new trial based on newly discovered evidence that the lineup in which he was identified was unconstitutional.

> The fault with the ruling of the trial court here is that appellant, if he has anything to complain about on this point, can complain that

[3]The Fifth Circuit apparently feared that the government might never be able to meet its burden:

> The burden of proving harmlessness placed on the Government by *Remmer* is difficult to bear. If all that need be shown by a defendant is the existence of tampering, an unscrupulous defendant could purposefully subvert the administration of justice by initiating such bribery attempts.

597 F.2d at 489. But here the government did not adduce any evidence whatsoever indicating that petitioner initiated the bribery attempt. Obviously, such proof by the government might be a basis for refusing to invoke the *Remmer* presumption. However, the possibility that some defendant *might* initiate a bribe attempt is an insufficient justification for denying to all defendants a fair and impartial jury which the *Remmer* presumption seeks to insure.

> his constitutional right to due process under the Fifth Amendment has been denied him. Such alleged infringement of his constitutional rights could be raised by a collateral attack at any time subsequent to the conviction becoming final. If appellant can attack his conviction collaterally, his counsel's lack of diligence at time of trial should be no barrier to considering a motion for a new trial on the merits of the constitutional grounds raised.
>
> * * *
>
> Thus we are of the view that the "due diligence" standard which ordinarily governs disposition of motions for a new trial based on allegedly newly discovered evidence . . . should not apply when the new evidence raises issues which challenge the constitutional validity of the conviction. Cf. the standard established by Fed.R.Crim.P. 52(a) for disregarding ordinary trial errors as "harmless" as contrasted with the higher standard which the Supreme Court in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) has held must be applied in judging the harmlessness of constitutional error.

436 F.2d at 158-59. *Marshall* was later recognized by the Fifth Circuit. *United States v. Shelton,* 588 F.2d 1242, 1250 (5th Cir. 1978). Yet the Fifth Circuit ignored it here.

The Fifth Circuit's circumvention of the presumption and burden of proof required by *Remmer* is also ap-

parent in light of the well-established line of decisions which hold that on appeal from final judgment, improper juror contacts constitute plain error which will be noticed by the court on its own initiative. *United States v. United States Gypsum Company,* 438 U.S. 422 (1978) (ex parte meeting between judge and juror warranted new trial although point not argued in trial court, in court of appeals or in supreme court briefs); *Rogers v. United States,* 422 U.S. 35 (1975) (court's instruction to jury in absence of counsel plain error).

Petitioner appealed from the final judgment.[4] He brought the issue to the trial court's attention before the notice of appeal was filed. He raised the issue on appeal. In *Rogers* and *United States Gypsum,* this Court found fundamental error warranting a new trial. *United States Gypsum* was a civil case in which the issue was not raised until oral argument. Yet this Court found plain error requiring a new trial.

This Court's opinion in *Remmer* was clear. Where there is evidence of improper juror contact, the government has the burden of overcoming the presumption of prejudice by proving that the contact was harmless. That rule cannot be circumvented by imposing an initial burden on the defendant to prove that he could not

[4]Petitioner appealed from the final judgment and conviction, not the motion for new trial. An appeal from an out-of-time motion for new trial is no substitute for an appeal from final judgment. *Edwards v. Cook,* 566 F.2d 960 (5th Cir. 1978); *Burnside v. Eastern Airlines, Inc.,* 519 F.2d 1127 (5th Cir. 1975). Conversely, the presentation of an ore tenus motion for new trial 19 days after verdict cannot deprive petitioner of his right to a plenary appeal of the final judgment which is governed squarely by *Remmer* and *United States Gypsum.*

have discovered the impropriety before verdict. Fundamental constitutional error is not subject to the rule of due diligence. The conflict between the *Jones* decision and the *Remmer* and *Marshall* decisions justifies the grant of certiorari to review the judgment below.

2. The Fifth Circuit Incorrectly Held That This Court's Decisions In *Michigan v. Tyler,* 436 U.S. 499 (1978) And *Mincey v. Arizona,* 437 U.S. 385 (1978) Are Not Retroactive.

The search and seizure which were the subjects of petitioner's motion to suppress occurred on April 12, 1974. This Court decided two cases in 1978 which squarely govern the propriety of the search and seizure. *Michigan v. Tyler,* 436 U.S. 499 (1978); *Mincey v. Arizona,* 437 U.S. 385 (1978). The Fifth Circuit misapplied this Court's decision in *United States v. Peltier,* 422 U.S. 531 (1975) in determining that *Mincey* and *Tyler* were not retroactive.

In *Peltier,* this Court determined that its decision in *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973) should not apply retroactively. However this Court carefully pointed out that it so ruled because *Almeida-Sanchez* was a clear departure from existing statutory and case law and law enforcement officers had a right to rely on that prior law:

> The Border Patrol agents who stopped and searched respondent's automobile were acting pursuant to §287(a)(3) of the Immigration and Nationality Act of 1952 . . .

> Between 1952 and *Almeida-Sanchez*, roving Border Patrol searches under §287(a)(3) were upheld repeatedly against constitutional attack . . . .
>
> It was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval, that border patrol agents stopped and searched respondent's automobile. Since the parties acknowledge that *Almeida-Sanchez* was the first roving Border Patrol case to be decided by this Court, . . . we cannot regard as blameworthy those parties who conform their conduct to the *prevailing statutory or constitutional norm.*

422 U.S. at 540-41 (footnotes omitted).

Almeida-Sanchez was this Court's first roving border patrol case and was contrary to the "prevailing statutory or constitutional norm." This Court therefore concluded that the decision should not affect searches conducted pursuant to that norm. *Mincey* and *Tyler*, however, were not the first cases to deal with exigent circumstances and the right of privacy. They were not contrary to the prevailing constitutional norm. Rather, they were fully in accord with the norm which existed not only when they were decided, but also when the searches in this case were conducted. There is no issue of retroactivity because *Mincey* and *Tyler* did not create any new constitutional principle.

In *Mincey* and *Tyler*, this Court held that once the exigent circumstances which justify the initial intrusion into defendant's premises disappear, law enforcement officers cannot search any further in the absence of a warrant. In *Mincey*, this Court rejected the argument, relied on by district court and the government here, that the initial police intrusion into a building justified by an emergency eliminated any right of privacy in the premises and justified a subsequent warrantless search.

> It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person. [citations omitted]. It is quite another to argue that he also has a lessened right of privacy in his entire house.

437 U.S. at 391. This conclusion was not based on any new constitutional principle. It was well-settled law from this Court's prior decisions.

> Indeed this very argument was rejected when it was advanced to support a warrantless search of a dwelling where a search occurred as "incident" to the arrest of its occupant. *Chimel v. California,* 395 U.S. 753, 766 n.12, 89 S.Ct. 2034, 2042, 23 L.Ed.2d 685.

Id. Chimel was decided in 1969, four years before the search in this case. This Court was explicit in *Chimel*:

> [W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically

> be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

395 U.S. at 766, n.12.

This Court also held in *Mincey* that the warrantless first search had to be circumscribed by the emergency which initially justified it. Once the emergency ended, any further search required a warrant. Again, this holding merely reiterated this Court's prior decision in *Terry v. Ohio*, 392 U.S. 1 (1968). *Mincey*, *supra*, 437 U.S. at 390. As this Court stated in *Terry*:

> A search for weapons in the absence of probable cause to arrest, however, must, *like any other search*, be strictly circumscribed by the exigencies which justify its initiation. [citations omitted].

392 U.S. at 25-26 (emphasis added).

The Fifth Circuit itself has not consistently dealt with the retroactivity issue. It has applied *Peltier* in the same manner which petitioner urged in this case. *United States v. Martinez*, 526 F.2d 954 (5th Cir. 1976) (opinion on rehearing *en banc*). In *Martinez*, a search took place subsequent to *Almeida-Sanchez* but before the decisions in *United States v. Ortiz*, 419 U.S. 824 (1975) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The government contended that *Ortiz* and *Brignoni-Ponce* could not be considered in determining the validity of the search. The Fifth Circuit rejected that contention.

> Here then we have a search post *Almeida-Sanchez* and pre-*Ortiz*. The government argues that the extension of the rule announced in *Almeida-Sanchez*, applied to checkpoint searches for the first time in *Ortiz*, should not be given retrospective application. We disagree. *Ortiz* did not establish a new rule in an *overruling decision*. See *United States v. Peltier*, 1975, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374; *United States v. Miller*, 5 Cir. 1974, 492 F.2d 37, 40. On the contrary the Court took pains to point out that it was following *Chambers v. Maroney*, 1970, 339 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 419, and *Almeida-Sanchez*.

526 F.2d at 955 (emphasis by court). The court also rejected the argument that *Brignoni-Ponce* should not be considered retrospectively because

> *Brignoni-Ponce* did not establish a new rule in an overruling decision, *Miller*, *supra*, or a new constitutional principle, *Peltier*, *supra*.

526 F.2d at 956.

In *Mincey*, as in *Ortiz*, this Court carefully pointed out that it was following established law. It did not establish a new constitutional principle or an overruling decision. The limited nature of exigent circumstances which justify a warrantless search was spelled out in *Terry* in 1968. The effect of a limited intrusion on a person's right to privacy was spelled out in *Chimel*. *Terry* and *Chimel* established the parameters of the officers'

conduct at the time of the search in this case. The justification advanced in *Peltier* for denying retrospective application of *Almeida-Sanchez* simply does not apply to *Mincey*.

The Fifth Circuit's refusal to apply *Mincey* and *Tyler* means that every time this Court applies one of its earlier search and seizure decisions to a different set of facts that application has no effect on searches conducted prior to it. In *Peltier*, this Court criticized Justice Brennan's dissent in which he stated that "the first duty of a court will be to deny the accused's motion to suppress if he cannot cite a case invalidating a search or seizure on identical facts." 422 U.S. at 542, n.13. Yet that is precisely what the Fifth Circuit did here. *Terry* and *Chimel* required suppression of the evidence by the trial court. *Mincey's* application of *Terry* and *Chimel* required suppression by the Fifth Circuit. The facts of *Terry* and *Chimel* were not identical to this case. The application of those cases to identical facts occurred after the search. Yet the Fifth Circuit applied the retroactivity concept.

Peltier did not intend such a result. Once this Court proscribes a certain type of conduct, the government should not need additional case law on each fact situation to which that rule of law could be applied before the government agents "have notice" of the law. That would eliminate the deterrent effect of the exclusionary rule. *Compare Peltier, supra*, 422 U.S. at 538-39. The Fifth Circuit's distortion of this Court's decision in *Peltier* justifies the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment, opinion and order on rehearing of the Fifth Circuit.

Respectfully submitted,

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September 4, 1979

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

Donald E. JONES,
Defendant-Appellant.

No. 78-5509.

United States Court of Appeals,
Fifth Circuit.

June 20, 1979.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH and VANCE, Circuit Judges, and BOOTLE,* District Judge.

BOOTLE, District Judge:

Convicted by a jury of multiple offenses relating to the operation of an illegal whiskey distillery and not challenging the sufficiency of the evidence, appellant urges two grounds for reversal: first, alleged error in denying his motion for new trial upon his showing that someone attempted to bribe a juror during trial and, second, alleged error in denying his motion to suppress

*District Judge of the Middle District of Georgia, sitting by designation.

evidence seized in a search made without a search warrant. For reasons following we affirm.

On August 1, 1975 a jury convicted the appellant, Donald E. Jones, on five counts of a seven count indictment arising out of his participation in the operation of an illegal whiskey distillery. The district court dismissed one count as duplicative of other counts and the jury acquitted appellant on one count. Appellant failed to appear for a hearing and sentencing on August 20, 1975 and was not apprehended until almost three years later. He was finally sentenced on June 23, 1978 and now appeals his conviction.

I. Jury Tampering

Two days after the verdict, one of the jurors was contacted by appellant's wife, Debra Jones, and "a huge black man" who was later identified as Willie Lucas. Lucas solicited this juror's agreement that appellant had been "shanghaied" and refused to tell her how her address had been found. This juror, being upset, contacted the trial judge who on August 4, 1975 entered an order directing an investigation by the United States Attorney's office and the Bureau of Alcohol, Tobacco and Firearms. The court directed that all statements taken during the investigation be filed with the Clerk as part of the record. The positive identification of Willie Lucas as the "huge black man" is supplied in a report of an interview with Lucas so filed.

On August 5, 1975, appellant submitted a motion to interview jurors pursuant to a local rule and filed in support thereof an affidavit dated August 4, 1975 by the same Willie Lucas which detailed post-verdict state-

ments made by another juror, Arlie Crooms. Ms. Crooms was quoted as saying to him that she did not feel that the right verdict was given, that there was no proof that appellant owned the stills, and that she voted guilty only because of pressure from other jurors and her illness during the deliberations.

During the court ordered investigation, ATF agents interviewed all the jurors concerning possible approaches. When they interviewed Ms. Reboso, one of these jurors, they were told that juror Arlie Crooms had told her during the trial that she had been offered $1000 by someone to vote for acquittal. Subsequently, Ms. Crooms was interviewed and denied any improper approach. She later recanted and informed the ATF of a bribe offer by Willie Lucas who asked that she vote to acquit appellant.

The district court ordered a hearing on the matter for August 20, 1975. At the hearing, Ms. Crooms, Ms. Reboso, and the juror who was subjected to a post-verdict approach all testified. They were questioned by the Government attorney and by counsel for a co-defendant, B. J. Herndon, but no questions were asked by appellant's counsel. In fact, no evidence at all was submitted on behalf of appellant. The district court was informed that the Marshal had been unable to serve a subpoena on Willie Lucas and that the Marshal had been told that Lucas had decided to go to Nassau until August 24th. As stated previously, appellant also failed to appear and participate in this hearing despite the fact that by order of August 12, 1975 the district court had commanded his presence and despite the fact that at 10:30 A.M. on the morning of the hearing appellant and

his wife were in his attorney's office at which time his attorney cautioned him to be present for the hearing at 1:00 P.M. The only explanation of his absence was made by his attorney as follows: "I spoke to Mrs. Debra Jones. She said that she left Donald a while ago and he was on his way down here. They came in separate cars. She made it; I don't know why he didn't make it." As above indicated, appellant's wife Debra (with separate counsel) was present at the hearing and, despite her participation in the post-verdict approach to a juror, was not called by appellant's counsel or by anyone as a witness. At the conclusion of the testimony, appellant's counsel made a motion which in substance was a motion for a new trial[1] and the district court denied it.

It is well established law that an improper communication such as a bribe offer to a juror during the trial raises a presumption of prejudice and that a new

[1]Appellant's motion is quoted in full below:

> I would like to make a Motion at this time on behalf of Mr. Donald Jones that based upon the testimony adduced here from the juror, Mrs. Crooms, and which is corroborated by Mrs. Reboso, and whom Mrs. Crooms corroborates, the fact that Mrs. Reboso had made mention she knew a particular witness and the fact that for two days, apparently, Mrs. Reboso had known the name of one of the defendants, and Mrs. Crooms said that she had reached a verdict, apparently not by choice but by what she says was the — either the other understanding of Mrs. Reboso or some of the other jurors, that she would have to come back and she wasn't feeling well, and that she reached a verdict that did indicate what she felt to be her verdict; she did it because of compliance with other jurors, so on that basis and on the testimony adduced, I would make a motion on behalf of Don Jones to set aside the verdict as returned by this jury.

trial must be ordered unless the Government is able to bear its heavy burden of proving harmlessness. *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), *appeal after remand,* 350 U.S. 377, 76 S.Ct. 425, 100 L.Ed. 435 (1956). Both appellant and the Government have concentrated their efforts primarily on the question of harmlessness raised in *Remmer.* The Government has asserted that both jurors, Ms. Reboso and Ms. Crooms showed by their testimony that the bribe offer had no effect on their deliberation.[2] Appellant insists that harmlessness was not shown. Both sides have overlooked some fundamental issues inherent in the procedural context in which appellant's motion was made. Since these questions are controlling, this court need not reach the issue of harmlessness.

The jury's verdict was returned August 1, 1975. A timely motion for new trial was filed on August 8, 1975 and overruled on August 12, 1975. Appellant's motion which is the subject of this appeal was not made until August 20, 1975. After seven days from the date of the verdict, a motion for new trial cannot be entertained unless it is based on newly discovered evidence. Fed.R.Cr.P. 33. Appellant's motion was thus one which would have to be founded upon allegedly newly dis-

[2]Juror Crooms testified: "I didn't say anything to her (referring to Juror Reboso) because after she didn't call me, I didn't say anything to her because I had decided to forget about it." (Supp. R. 19). Juror Reboso testified: "I didn't think of it at all. I was having personal problems which were more important to me at the time. I sort of heard her and it went in one ear and out the other because my problems were major problems. I mean, I am being as sincere as I can be." (Supp. R. 38). In addition Juror Crooms argued for appellant's acquittal during jury deliberations and the jury did in fact acquit him of one count.

covered evidence of an improper communication to a juror. This court and the Court of Appeals for the Sixth Circuit have recognized the propriety of categorizing such a motion as one for a new trial based upon newly discovered evidence. *Richardson v. United States*, 360 F.2d 366 (5th Cir. 1966); *Zachary v. United States*, 275 F.2d 793 (6th Cir. 1960). Both the Government and appellant have treated the issues in this case without recognizing the requirements and burdens placed on a defendant presenting such a motion.

In most new trial motions based on newly discovered evidence, the proffered evidence goes directly to proof of guilt or innocence. In such a motion the movant has a burden of showing (1) that the evidence was in fact discovered after the verdict, (2) that the movant's failure to learn of this evidence was not due to any lack of diligence on his part, (3) that the evidence is material and not merely cumulative or impeaching, and (4) that a new trial would probably result in an acquittal. *United States v. Bryant*, 563 F.2d 1227 (5th Cir. 1977); *United States v. Rachal*, 473 F.2d 1338 (5th Cir. 1973); *United States v. Hagerty*, 561 F.2d 1197 (5th Cir. 1977); *United States v. Schwartzenbaum*, 527 F.2d 249 (2d Cir. 1975); *United States v. Ellison*, 557 F.2d 128 (7th Cir. 1977). Admittedly, there are major distinctions in the substance of the evidence proffered by the appellant and that proffered in the above cited cases since appellant's evidence goes to the fairness of the trial rather than to the usual question of guilt or innocence. Regardless of those distinctions a motion for a new trial can not be based on newly discovered evidence unless that evidence is in fact unknown to the movant until after the verdict. The appellant had the burden of proving that this evidence was in fact newly discovered and that his

failure to discover it prior to verdict was not due to his lack of diligence.[3] *Zachary v. United States, supra; see United States v. Ellison, supra.* It deserves note that in *Remmer*, it was established, by the Government's failure to deny, that "[n]either the judge nor the prosecutors informed the petitioner of the incident, and he and his counsel first learned of the matter by reading of it in the newspapers after the verdict." 347 U.S. at 228, 74 S.Ct. at 451, 98 L.Ed. at 655. Such a burden is eminently reasonable in view of the devastation which jury tampering could bring to our country's highly valued jury system. The burden of proving harmlessness placed on the Government by *Remmer* is difficult to bear. If all that need be shown by a defendant is the existence of tampering, an unscrupulous defendant could purposefully subvert the administration of justice by initiating such bribery attempts.

---

[3]Another line of cases forcefully shows the relevance of a defendant's knowledge or lack of knowledge before the verdict of jury tampering. These cases teach that a defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct. *Oakes v. Howard*, 473 F.2d 672 (6th Cir. 1973); *United States v. Brumbaugh*, 471 F.2d 1128, 1130 (6th Cir. 1973) (McCree, J., concurring); *United States v. Carter*, 433 F.2d 874 (10th Cir. 1970); *Hall v. United States*, 396 F.2d 428 (10th Cir. 1968); *United States v. Coduto*, 284 F.2d 464 (7th Cir. 1960). The rule requiring a showing that the evidence of jury tampering is newly discovered and the rule of waiver established by the above cited cases are not aimed necessarily at discovering a defendant's complicity in the improper communication to the jury. The policies behind both rules fully encompass any knowledge possessed by the defendant before the verdict whether it be innocent or not. Such knowledge should be disclosed to the trial judge before the verdict so that an attempt can be made to salvage the trial by ridding the jury of prejudicial influences.

In this case appellant presented no evidence whatever on the issues of his lack of knowledge or his due diligence. In fact, his counsel did not even disclaim such knowledge on behalf of appellant. All that appellant has ever stated is that no evidence shows that appellant was "connected with" the bribe offer.[4] Thus appellant never satisfied his burden of proof as movant and the *Remmer* presumption does not come into play. The district court was correct in denying appellant's motion for new trial.

II. Motion to Suppress

Appellant's other contention is that the district court should have suppressed evidence seized by ATF agents during a search conducted without a warrant. On April 12, 1974, local police officers responded to a reported shooting at the premises leased by appellant. During their search for suspects or injured persons, these officers discovered appellant's illegal stills and other

[4]It is true that the evidence does not affirmatively establish the appellant's involvement in the bribe offer. However, our decision is grounded on the total lack of evidence disproving such involvement or knowledge. Though not a basis for our decision, it is interesting to note that the circumstances that are shown by the record tend to show rather than negate such knowledge or involvement. Willie Lucas, who offered the bribe, accompanied appellant's wife two days after the verdict in an attempt to solicit a juror to impeach the verdict. In furtherance of this endeavor, Lucas submitted an affidavit as support for appellant's motion to interview jurors. Events that came to light at trial also raise questions. It is clear that Debra Jones and a Government witness, with appellant's knowledge, negotiated an agreement to pay said witness a large sum if he would not testify. The witness claims that appellant offered a bribe; appellant describes these events as an extortion attempt by the witness. Unfortunately, we have no way of knowing what the jury thought of these contacts.

related paraphernalia. These local officers then called in ATF agents who seized certain evidence. This court agrees with the district court's conclusion[5] that the ATF agents' conduct was proper under the doctrine of *United States v. Green*, 474 F.2d 1385 (5th Cir. 1973) which was the then prevailing law of this circuit. *See, United States v. Brand*, 556 F.2d 1312 (5th Cir. 1977).

Appellant contends that two recent Supreme Court cases, *Michigan v. Tyler*, 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978), and *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), invalidate *Green* and require that the evidence seized in the instant search be excluded. We conclude that *Tyler* and *Mincey* should not be applied retroactively on the facts of this case. *United States v. Peltier*, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975); *United States v. Montgomery*, 558 F.2d 311 (5th Cir. 1977).

AFFIRMED.

---

[5] *United States v. Herndon*, 390 F.Supp. 1017 (S.D.Fla. 1975).

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
August 6, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-5509 — U.S.A. v. DONALD E. JONES

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By/s/Sally Hayward
Deputy Clerk

cc: Mr. Neal R. Sonnett
Mr. Marc Cooper
Mr. Bruce A. Zimet

UNITED STATES of America

v.

Bobby J. HERNDON et al.,

Defendants.

No. 74-549-Cr-CF.

United States District Court,
S.D. Florida.
Feb. 20, 1975.

William Northcutt, Asst. U.S. Atty., Miami, Fla., for the United States.

Bernstein & Robrish, Miami, Fla. for defendant Bobby J. Herndon.

Max P. Engel, Miami, Fla., for defendant Donald E. Jones.

Louis Stoskopf, Miami, Fla., for defendant Thomas E. Jones.

ORDER

FULTON, Chief Judge.

In an Indictment filed on September 25, 1974, the defendants were charged with the illegal operation of a still located at Barn No. 4, 19955 S.W. 248th Street, Dade County, Miami, Florida, in violation of 26 U.S.C. §§5601(a)(1), (2), (4), (8), 5602, 5604, and 18 U.S.C. §371. On November 12, 1974, defendants Herndon,

Donald Jones and Thomas Jones filed a motion to suppress various equipment, supplies and miscellaneous items useable in the manufacture of whiskey which were seized on April 12, 1974 during a search of the barn, the house, several vehicles, and the person of Thomas Jones in the vicinity of 19955 S.W. 248th Street, Miami, Florida. Defendants contend that the search constituted a violation of the Fourth Amendment of the United States Constitution in that it was made without a search warrant and not incident to a lawful arrest. The government argues that the search was justified due to exigent circumstances. The government concedes that the defendants all have standing to bring this motion to suppress: Thomas Jones was on the premises when the search took place; Donald Jones was renting the premises; and Bobby Joe Herndon was living on the premises.

On December 13, 1974, the Court held an evidentiary hearing on defendants' motion. Testimony presented at the hearing established that on Friday, April 12, 1974, at 7:31 P.M. the Dade County Public Safety Department Perrine Substation received a call that there had been "shots fired in the area" at 19955 S.W. 248th Street. At 7:33 P.M., a patrol car unit was dispatched with one back-up unit. At 7:46 P.M. these two units responding to the call arrived on the scene.

As reflected by plaintiff's exhibit 1A, 19955 S.W. 248th Street, Dade County, Florida, is a rural farm area. The subject property consists of a house approximately 150 Feet from the road and a single story barn approximately 300-400 Feet from the rear of the house. The barn is approximately 50 Ft. in width and 500 Ft. in length.

Officers Charter and Dwyer were the two units who were dispatched to answer the call at 7:33 P.M. Officer Dwyer was the backup unit. Prior to either officer reaching the scene of the alleged shots, they were met by an unidentified white female in a light colored Cadillac who communicated with Officer Dwyer that one of the participants in the alleged shooting was parked on the corner of 199th Avenue and 244th Street. Both officers proceeded to this area. Both officers approached the defendant, Thomas Jones, who was seated in his automobile. Mr. Jones' automobile was parked approximately 200 yards from the rear of the subject barn. During the conversation with defendant, Thomas Jones, a 16 year old white male approached the officers and informed them that Thomas Jones did, in fact, reside at the scene and was, in fact, a participant in the "shots fired" as reported earlier. Thereafter, Officer Dwyer left the area with his unit and proceeded to 19955 S.W. 248th Street, where the house and barn are located. Officer Charter remained with defendant Jones, who was not yet under arrest.

Upon arriving at the scene, Officer Dwyer spoke with several more neighbors who informed him that they had observed three white males leave the barn, one entering his automobile and driving to the road in front of the house, the other two leaving the house at which time the shots were fired in the immediate area. After this information was related to Officer Dwyer, he approached the house and heard the telephone ring. On the front porch Officer Dwyer looked into the living room area through the front picture window and then entered the house, without knocking, through the partially opened door, and proceeded through the living room area into the kitchen where he answered the phone. Officer Dwyer

testified that he entered the house and subsequently the barn to look for injured persons or additional witnesses in connection with the shooting investigation. Officer Dwyer then looked around and saw no blood or injured people in the house.

Having found no one in the house, Officer Dwyer communicated with Officer Charter to proceed to the barn to search for injured people there. Officer Charter then arrived with defendant Jones in the rear cage portion of the car. Officer Charter testified that Jones had been arrested by this time for loitering and prowling because he could not explain his presence in the area. Officer Charter testified that the barn door was partially opened approximately 4 to 6 inches. The officers entered the barn equipped with flashlights and remained in the barn approximately 5 to 10 minutes. In the rear portion of the barn the officers came across what appeared to them to be some form of a "still". The officers then departed the barn, went back to the house at which time Officer Dwyer telephonically communicated with the Perrine Substation for them to dispatch the duty Lieutenant to proceed to the scene. Lt. Lyons arrived at the scene at approximately 8:30 P.M. and spoke with both Officers Dwyer and Charter. Subsequently, all three officers re-entered the barn and again viewed what the officers concluded was a possible illegal "still". The officers then departed the barn, re-entered the house at which time Lt. Lyons again telephonically communicated with the Perrine Substation and requested specifically that a Federal Treasury Agent, Agent Nowicki be telephoned and informed that an illegal still was being operated at the subject location. Agent Nowicki and Agent Harmon of the Bureau of Alcohol,

Tobacco and Firearms of the United States Treasury Department (hereinafter referred to as "ATF") arrived at approximately 10:00 P.M.

Treasury Agent Nowicki, after receiving the communication from the Perrine Substation, called Agent Harmon and requested that he accompany him to the location in the Southwest area of Dade County where the illegal "still" had been reported. Agent Nowicki readily admitted in his testimony that he attempted no communication whatsoever with any United States Attorney, Federal Judge or Magistrate at any time whatsoever on the evening of April 12, 1974.

Upon the arrival at approximately 10:00 P.M., Agent Nowicki testified that he read defendant Jones his rights and was handed a small wrench and knife purportedly taken from defendant, Thomas Jones upon his arrest by Officer Charter. Agent Nowicki purportedly observed a substance "mash" on the wrench itself and requested of defendant Jones to take his shoes off for possible evidence. Both Agents Nowicki and Harmon spoke with Lt. Lyons and Officers Charter and Dwyer as to their observations in the subject barn. The agents then proceeded to the barn, and viewed the still. From there they went to the house, following the electric wires from the still water pump. In the house they found several receipts from the Tropigas Company, a Georgia telephone book and some shoes, on the soles of which was mash. The gas receipts were in a closet in the hall by the electric panel where the wires terminated. The closet was open. The phone book was in a drawer which was partially open in a table and the shoes were on the floor in the bedroom.

The ATF agents then went outside the house and peeked into a truck camper parked on the lawn. In the truck they observed cardboard cartons similar to the ones they saw beside the still. These cartons were labeled "Reliance Products Ltd., Winnipeg, Canada." The truck was seized and the glove compartment was searched. An auto repair bill was found therein. The interior of the rear of the truck camper smelled of whisky. This occurred about 11:00 P.M.

The ATF agents then went to the car in which Jones was found. They saw in it items similar to those they saw by the still. They searched and seized it. In it they found a hydrometer.

All of the state and federal agents who testified at the hearing readily admitted that absolutely no attempt whatsoever was made to obtain any arrest or search warrants. In their view, none were required due to the exigent circumstances. Therefore, unless the Court finds that the searches were not justified and thus grants the motion to suppress, the Government will introduce at trial the following items from these searches and seizures:

1. The driver's license, wrench and shoes found on Thomas Jones.

2. Pictures and testimony about the still and related paraphernalia from the area of the barn.

3. The receipts, phone book and shoes from the house.

4. The cartons and receipt from the truck camper in the yard.

5. The hydrometer found in the car in which Jones was arrested.

Two searches were conducted in this case, the first by county police, and the second by federal ATF agents. In order to be upheld, both searches must be valid.

Defendant Thomas Jones was placed under arrest by the county police officers at about 8:15 P.M. on April 12, 1974 for loitering and prowling. However, the search of the house and barn by the state officers can not be considered as incident to a legal arrest for the following reasons: 1) Officer Dwyer had already entered and searched the house before Officer Charter placed Jones under arrest. 2) The officers entered the barn pursuant to their investigation of the shooting incident which had no relation to an arrest for loitering and prowling. Later in the evening an ATF agent placed Jones under arrest for the additional charge of possession of a switchblade knife. This arrest, however, occurred after both the house and barn had been searched by the county officers. 3) The county officers testified that both the loitering and prowling and possession charges against Jones were later dismissed for lack of prosecution and never refiled. This factor is some support for defendants' contention that the arrests themselves were not legal.

The Court finds, however, that the county officers' search was legal as based upon the exigent circumstance of looking for victims of a shooting incident. Being in a place where they had a right to be, the officers found the

still because it was in plain view. Witnesses had reported that they had heard shots fired and had seen three men running in the vicinity of the house and barn. Therefore it was logical and prudent for the officers to consider that there might be someone injured and in need of help in the house or the barn. The fact that no victims were actually found does not negate the real possibility that existed.

In Guzman v. Estelle, 493 F.2d 532, 537 (5th Cir. 1974), the court held that lack of time in which the search warrant could have been secured is an exigent circumstance that justifies a warrantless search. In this case, it would be senseless to expect police officers to obtain a warrant before answering the dispatch call, or, once on the scene, before entering the buildings. Clearly, in matters involving possible injury by gun shot, time is of the essence.

Once legally inside the barn, the still was in plain view. In Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1970), Justice Stewart held that where the initial intrusion that brings the police within plain view of an article is supported not by a warrant but by one of recognized exceptions to the warrant requirement, the seizure is legitimate. He stated that the plain view doctrine may be applied where an officer is not searching for evidence against the accused, but inadvertently comes across an incriminating object. *Id.* at 466, 91 S.Ct. 2022. Where objects fall in the plain view of an officer who has a right to be in the position to have that view, they are subject to seizure and may be introduced in evidence. Harris v. United States, 390 U.S. 234, 236, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968).

In this case the officers were searching for victims of a shooting incident. They entered the house and barn looking for victims, and inadvertently came across evidence of the operation of a still. No evidence was presented at the hearing to indicate that the officers' testimony of the reasons for their conduct should not be believed. Therefore the Court concludes that the search and seizure conducted by the county officers were legal.

The Court further finds that the search by the federal officers was also legal. The Court does not base its decision on the ground suggested by the government: that there was insufficient time for the ATF agents to obtain a warrant. In fact the evidence established that the ATF agents were called by the county officers at about 9:00 P.M., and that the magistrate could be reached until about 11:00 P.M. and was located only fifteen or twenty miles away. Furthermore, Federal Agent Harmon testified that the stills each weighed about 2800 pounds, and that he was not afraid that someone would walk away with a still. As for smaller items in the house, the county police had surrounded the area. Therefore, no emergency existed concerning the speed with which the federal agents arrived on the scene.

The federal search was legal because it was based upon a legal search by the county officers. Crucial to this determination are the facts that the county police called the federal agents to the scene, and that the federal search was directly related to the object of the county search.

The Court bases its determination that the federal search was legal upon the direct precedent established

by Judge Dyer in United States v. Green, 474 F.2d 1385 (5th Cir. 1973), cert. denied, 414 U.S. 829, 94 S.Ct. 55, 38 L.Ed.2d 63 (1973). While Green was away, a fire broke out in his apartment. City firemen entered the apartment to put out the fire, and requested the Fire Chief to come to the premises to determine the cause of the fire. During his investigation the Fire Chief inadvertently discovered counterfeiting plates. The Fire Chief then called the Secret Service. In response to the call, a Secret Service agent went to Green's apartment, and the Fire Marshall handed him the plates he had discovered. At no time did either the city or federal authorities seek to obtain a warrant.

Judge Dyer held that it was not necessary for the secret service agent to have obtained a warrant before he entered the apartment even though there was plenty of time in which to do so. 474 F.2d at 1390. Judge Dyer explained that the purpose of the Fourth Amendment is to prevent unauthorized invasions of privacy. However, once that privacy is lawfully invaded, a subsequent search of the area already searched constitutes no additional invasion of privacy and therefore no violation of the Fourth Amendment. Judge Dyer's holding is directly applicable to the factual situation here:

> The purpose of a search warrant is to ensure judicial authorization, in advance, of intrusions into constitutionally protected privacy. Where a lawful intrusion has already occurred and a seizure by a State officer has validly taken place as a result of that intrusion, the invasion of privacy is not increased by an additional officer, albeit a federal officer, who is

> expert in identifying the type of contraband discovered, to enter the premises to confirm the belief of the State officer and to take custody of the evidence. Once the privacy of a dwelling has been lawfully invaded, to require a second officer from another law enforcement agency arriving on the scene of a valid seizure to secure a warrant before he enters the premises to confirm that the seized evidence is contraband and to take custody of it is just as senseless as requiring an officer to interrupt a lawful search to stop and procure a warrant for evidence he has already inadvertently found and seized.

474 F.2d at 1390.

The rationale which justifies the federal search is that the subsequent intrusion does not significantly increase a preexisting legitimate interference with a protected interest. United States v. Soriano, 482 F.2d 469, 476 (5th Cir. 1973). Thus the determination that the subsequent search does not significantly add to the invasion of privacy caused by the initial search is crucial. As pointed out in *Soriano*, this requirement is met if the successive intrusions are close in time, practically identical in nature and analytically and factually separable only because made by two different sovereigns. 482 F.2d at 476 n.13. The Court finds that all of these criteria were present in this case.

In United States v. Carney, 356 F.Supp. 855, 858 n.1 (M.D.Tenn. 1973), the court distinguished its facts from *Green* in that in *Green* the secret service agent entered "subsequent to and pursuant to" the discovery of the Fire Marshall. The rationale is that independent

searches constitute separate and additional invasions of privacy. However, here as well as in *Green*, the federal authorities entered the premises pursuant to a call by the local authorities, and the search conducted by the federal agents was directly related to the objects discovered by the county oficers. Therefore, based upon the authority of United States v. Green, United States v. Soriano, and United States v. Carney, the Court concludes that the search and seizure conducted by the federal officers were legal.

The Court has considered all of the evidence presented at the evidentiary hearing, and has studied all of the submissions filed by the parties. For the foregoing reasons, the Court concludes that the searches of both the county and federal officers were legal, and therefore the motion to suppress the evidence seized therefrom is hereby denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Solicitor General, Department of Justice, Washington, D.C., 20530, Counsel for the Respondent. I further certify that all parties required to be served have been served.

By: _____

ROBYN GREEN, ESQUIRE
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Counsel for Petitioner

Supreme Court, U. S.
FILED
AUG 4 1980
MICHAEL RODAK, JR., CLERK

No. 79-1838

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RUTH RAISEN,

Petitioner,

v.

PHILIP RAISEN and INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENTS' BRIEF IN OPPOSITION

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INDEX

ARGUMENT 2

CONCLUSION 6

CITATIONS

Alexander v. Alexander,
140 F.Supp. 925 (D.S.C. 1956) 5

Alfree v. Alfree,
410 A.2d 161 (Del. 1979) 4

Bencomo v. Bencomo,
200 So.2d 171 (Fla. 1967) 5

Brawner v. Brawner,
327 S.W. 2d 808 (Mo. 1959) 4, 5

Gaston v. Pittman,
285 F.Supp. 645 (N.D. Fla. 1968) 5

Heckendorn v. First National Bank,
19 Ill 2d, 166 N.E.2d 571 (1960) 5

Jones v. Sweet,
244 Ga. 715, 261 S.E.2d 610 (1979) 4

Locklair v. Locklair,
256 F.Supp. 530 (D.S.C. 1966) 5

Lytell v. McGahey Chrysler-Plymouth, Inc.,
180 So.2d 354 (Fla. 3d DCA 1965) 2

Paiewonsky v. Paiewonsky,
446 F.2d 178 (3d Cir. 1971), *cert. denied,*
405 U.S. 919, (1972) 4

Railway Express Agency, Inc. v. New York ,
336 U.S. 106, (1949) 4

Smith v. Smith
361 A.2d 756 (Pa. App. 1976) 5

Sosna v. Iowa,
419 U.S. 393 (1975) 3

Thompson v. Thompson,
218 U.S. 611 (1910) 3

Trammel v. United States,
100 S.Ct. 906 1980) 2-3

Tyrken v. Tyrken,
63 Ill. App. 3d 199, 19 Ill.Dec. 932, 379 N.E.2d
804 (1978) 4

Vogel v. Robison,
80 Ill.App.3d 312, 35 Ill.Dec. 622,
399 N.E.2d 688 (1980) 4

Welch v. Moothart,
89 So.2d 485 (Fla. 1956) 2

Wilson National Life Insurance Company v. Glaaser,
136 So.2d 651 (Fla. 3d DCA 1962) 2

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The real question posed by the petitioner is whether Florida is forbidden by the Equal Protection or Due Process Clauses of the Fourteenth Amendment from retaining, as a matter of public policy, the common law doctrine of interspousal tort immunity.[1] That question is simply not a substantial federal constitutional question. Certiorari should therefore be denied.

---

[1]Petitioner erroneously cites the Due Process Clause of the Fifth Amendment, which applies only to federal action, as a basis for the claim that Florida's doctrine of interspousal immunity denies married couples access to state courts. The reference should be to the Due Process Clause of the Fourteenth Amendment.

ARGUMENT

The respondents have no quarrel with the fact that petitioner did attempt to raise this federal constitutional question at each stage of the proceedings below. And they have no significant difference with petitioner's "Statement of the Case & Fact."[2] They accordingly premise this brief in opposition on the claim that the federal constitutional issue, as raised by petitioner, is not substantial and not worthy of review by this Court.

1. One profound manifestation of the lack of substantiality is the fact that none of the opinions rendered in the Florida courts, not even the dissenting opinion in the Florida Supreme Court (*see* Pet. App. A-13 to A-21), made any mention of petitioner's constitutional claim. Such total silence by the Florida judiciary is eloquent testimony to the fact that, in implicitly considering and rejecting this claim, the courts below deemed the claim to border on the frivolous.

2. The adoption or rejection by a State of the interspousal tort immunity doctrine finds constitutional footing in the police powers of the States to regulate matters of marriage and domestic relations. Those are "concerns traditionally reserved to the states," *Trammel* v.

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[2]Respondents hasten to add, however, that the allegations in petitioner's complaint that her lawsuit was not fraudulent and would not imperil domestic harmony, and that the application of interspousal tort immunity would deprive her of due process and equal protection of the laws, were not well-pleaded under Florida rules of practice and were not admitted by respondents' motion to dismiss. Fla. R.Civ. P.1.110(b); *Welch* v. *Moothart*, 89 So.2d 485 (Fla. 1956); *Lytell* v. *McGahey Chrysler-Plymouth, Inc.*, (Fla. 3d DCA 1965); *Wilson National Life Insurance Co.* v. *Glaaser*, 136 So.2d 651 (Fla. 3d DCA 1962).

United States, 100 S.Ct. 906, 912 (1980), concerns that fall within "an area that has long been regarded as a virtually exclusive province of the States," *Sosna* v. *Iowa,* 419 U.S. 393, 404 (1975). And matters that fall within that area of "virtually exclusive" state concern are largely governed by legislative determinations of public policy. As this Court said in *Thompson* v. *Thompson,* 218 U.S. 611, 618 (1910), with respect to opening local courts to tort suits between husband and wife,

> Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it. But these and kindred considerations are addressed to the legislative, not the judicial branch of the government. In cases like the present, interpretation of the law is the only function of the courts.

3. In holding that "the common law doctrine of interspousal tort immunity is still viable in Florida," Pet. App. A-13, the Florida Supreme Court was applying the *Thompson* v. *Thompson* principle that changes in the common law doctrine of interspousal tort immunity "should be changed through legislative enactment and not by judicial decision," Pet. App. A-9. And because the arguments pro and con respecting that doctrine are so largely matters of legislative or public policy, the petitioner is reduced to the complaint (Petition 8) that the interspousal tort immunity doctrine fails to accomplish its various policy goals "and is therefore unconstitutional." In other words, petitioner disagrees with the policy that is embedded in the Florida common law with the approval of the Florida legislature. Such disagreement can hardly rise to the level of a substantial federal constitutional

claim. Nor can that disagreement serve to alter the role of this Court, which traditionally refuses to judge the wisdom of state legislative policies. *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106 (1949).

4. With respect to petitioner's equal protection claim, it need only be said no serious challenge can be made to an interspousal classification of people "by their marital status" when dealing with matters relating to marriage and domestic relations. That is certainly not a suspect classification, and does not even pretend to discriminate as between husbands and wives. It is enough if there is a reasonable relationship between the goal of promoting matrimonial harmony and achieving that goal by means of imposing interspousal tort immunity.

The leading authority supporting such a classification is *Paiewonsky* v. *Paiewonsky,* 446 F.2d 178, 181-182 (3rd Cir. 1971), wherein this Court denied certiorari, 405 U.S. 919 (1972). The Third Circuit could find no violation of equal protection in the alleged discrimination against women resulting from the doctrine of interspousal tort immunity. The court said that it had not been convinced that "the immunity doctrine lacks substantial vitality" and that "it follows that it has a reasonable relationship to the [promotion of domestic tranquility] interest sought to be furthered by it." To the same effect, *see Alfree* v. *Alfree,* 410 A.2d 161, 163 (Del. 1979); *Jones* v. *Sweet,* 244 Ga. 715, 261 S.E.2d 610 (1979); *Brawner* v. *Brawner,* 327 S.W.2d 808, 815 (Mo. 1959); *Tyrken* v. *Tyrken,* 63 Ill. App. 3d 199, 379 N.E.2d 888 (1978); *Vogel* v. *Robison,* 80 Ill. App. 3d 312, 399 N.E.2d 688 (1980).

Other courts, in rejecting such equal protection claims, have noted that this interspousal tort doctrine applies to husbands as well as wives and thus establishes no in-

vidious sex discrimination. *See Locklair* v. *Locklair,* 256 F.Supp. 530 (D.S.C. 1960); *Smith* v. *Smith,* 240 Pa.Super. 97, 361 A.2d 756, 757 (1976).

5. With respect to petitioner's due process claim that married couples are denied access to state courts by reason of the immunity doctrine, the unsubstantiality of the claim is equally evident. Courts that have dealt with that kind of claim have uniformly ruled that a spouse does not have a property interest in a cause of action when it is not recognized at common law. And even if such a property interest in a suit were to be recognized, the courts hold that such a property interest is lawfully restricted in a matter of public concern by virtue of the State's police power. *See Heckendorn* v. *First National Bank,* 19 Ill.2d 190, 166 N.E.2d 571, 574 (1960); *Brawner* v. *Brawner, supra,* 327 S.W.2d at 814-815; *Smith* v. *Smith, supra,* 361 A.2d at 757.[3]

In sum, petitioner has failed to present a substantial federal constitutional question.

---

[3]There appears to be one federal district court case stating somewhat indiscriminately, that the Florida interspousal immunity doctrine is superseded by the Fourteenth Amendment. *Alexander* v. *Alexander,* 140 F.Supp. 925, 928 (D.S.C. 1956). But that decision has been expressly repudiated by a later decision in the same court, *Locklair* v. *Locklair,* 256 F.Supp. 530, 532-533 (D.S.C. 1966), which noted that the *Alexander* sentiments were at best *obiter dicta.* The *Alexander* decision, which was a *lex loci delicti* interpretation of Florida law, has been disapproved by the Florida courts. *Bencomo* v. *Bencomo,* 200 So.2d 171, 174 (1967); *Gaston* v. *Pittman,* 285 F.Supp. 645, 646 (N.D.Fla. 1968).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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